TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1912.

No. [illegible]272.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, PLAINTIFF IN ERROR,

vs.

J. MARVIN BRIGGS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED APRIL 26, 1911.

(22,639.)

(22,639.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 576.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a Court of Appeals.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, Plaintiff-Appellant,
against
J. MARVIN BRIGGS, Defendant-Respondent.

Appeal from Second Department.

Case and Exceptions.

Asa A. Spear, Attorney for Plaintiff-Appellant, 79 Wall Street, Borough of Manhattan, New York City.

William J. Youngs, United States Attorney and Attorney for Defendant-Respondent, P. O. Building, Borough of Brooklyn, New York City.

1 Supreme Court, Appellate Division, Second Department.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, Plaintiff-Appellant,
against
J. MARVIN BRIGGS, Defendant-Respondent.

Statement under Rule 41.

This action was commenced on the 9th day of November, 1906, by the service of a copy of the summons and complaint upon the defendant. At the same time a temporary injunction, with an order to show cause why it should not be continued pendente lite, was served on defendant.

On December 17, 1906, after the hearing at which defendant was represented by William J. Youngs, United States Attorney for the Eastern District of New York, an order was made continuing said injunction till final judgment.

On December 17, 1906, plaintiff served an amended complaint.

On December 20, 1906, said order continuing the injunction was duly entered.

2 On December 24, 1906, defendant served notice of appearance by William J. Youngs, United States Attorney for the Eastern District of New York, and also his answer to the amended complaint.

The names of the original parties are as above stated: no changes have occurred.

The action was submitted to Mr. Justice Jaycox at a Special Term of the Supreme Court, held at Patchogue, Suffolk County, on the — day of July, 1907, upon an agreed statement of facts.

On March 7, 1908, an order was duly made and entered substituting Asa A. Spear as plaintiff's attorney in the action in place of Joseph Wood.

Summons.

New York Supreme Court, County of Suffolk.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, Plaintiff,
against
J. MARVIN BRIGGS, Defendant.

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer,
3 judgment will be taken against you by default for the relief demanded in the complaint.

Dated November 2nd, 1906.

JOSEPH WOOD,
Plaintiff's Attorney.

Office and Post Office Address, No. 141 Broadway, Borough of Manhattan, New York, N. Y.

Amended Complaint.

Supreme Court, Suffolk County.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, Plaintiff,
against
J. MARVIN BRIGGS, Defendant.

The complaint of the above-named plaintiff by Joseph Wood, its attorney, respectfully shows to this Court:

First. That at all times hereinafter stated the plaintiff was and still is a domestic corporation duly organized under the Laws of the State of New York.

4 Second. That on or about the 1st day of March, 1901, Helen T. Smith and William Sydney Smith were and still are the owners in fee simple of a very large tract of land under the waters of the Great South Bay, in the County of Suffolk and State of New York, extending from a line known as "The Ranges," east several miles and including the whole width of said Great South Bay, subject to the dower right of Cornelia T. Smith, their mother, therein; that said Helen T. Smith and William Sydney Smith were and now are minors under the age of twenty-one years, and Cornelia T. Smith and Thomas S. Strong then were and now are their duly constituted general guardians.

Third. That on or about the first day of March, 1901, the said Cornelia T. Smith, individually, and the said Cornelia T. Smith and Thomas S. Strong, as general guardians of said Helen T. Smith and William Sydney Smith, granted,

demised, and leased unto the plaintiff by a lease in writing, under their hands and seals, bearing date on that day, and the said plaintiff hired and took from the above-named persons for the term of five years from the first day of April, 1901, which term has since been extended a further period of five years at the annual rental of one hundred and three dollars ($103), all that portion of the above-described tract of land under water which is described in said lease as follows, to wit: "The following lots on Map of the Association Grounds: Number 282 containing seven acres, and Numbers 244, 245, 246, 253, 254, 255, 272, 273, 278, 279, 280, 281, 284, 309, 310, 311, 312, 318, 319, 320, 321, 346, 347 and 348, each containing four acres, and in all containing one hundred and three acres," for the purpose of planting, cultivating, growing or laying down oysters thereon.

5 Fourth. That on or about the 1st day of March, 1901, the said Cornelia T. Smith, individually, and the said Cornelia T. Smith and Thomas S. Strong, as general guardians of said Helen T. Smith and William Sydney Smith, granted, demised and leased unto the plaintiff by a further lease in writing, under their hands and seals, bearing date on that day and the said plaintiff hired and took from the above-named persons for the term of five years from the 1st day of April, 1901, which term has since been extended a further period of five years at the annual rental of forty-two dollars ($42), all that portion of the above-described tract of land under water which is described in said further lease as follows, to wit: "The following lots on Map of the Association Grounds: Numbers 179, 180, 195, 196, 202 and 203, each containing four acres, and Numbers 237, 238 and 239 each containing four acres and 259 and 260, each containing two acres and in all containing forty-two acres," for the purpose of planting, cultivating, growing or laying down oysters thereon.

Fifth. That under the aforesaid leases, the said plaintiff immediately entered into possession of the said tracts of land under water, staked and buoyed the same and planted oysters thereon, expending in said work a very large sum of money. At the present time, there are planted and growing upon said lands, a large quantity of oysters, many of them nearly ready for market, worth at least five thousand dollars ($5,000).

Sixth. That the said oysters are private property of this plaintiff, and the said lands are very valuable for the cultivation of oysters.

Seventh. The defendant has been dredging in said Great South Bay with a steam dredge, and upon information and belief,

6 is now about to dredge a channel about 2,000 feet long and 200 feet broad and ten feet deep through the property of the plaintiff above-mentioned; and that prior to the commencement of this action the defendant has repeatedly threatened to commence the said dredging across the said premises; although defendant has no authority whatever or consent of the owners of the said premises, or of the plaintiff to do so, and has no lawful authority to do so; but has full knowledge that this plaintiff has leased the premises above-described and occupies the same for the purposes above-mentioned; and has planted the same with oysters, and has a large and valuable

quantity of oysters growing thereon; and that the defendant has been expressly prohibited by this plaintiff and the owners of said lands from doing such dredging; and yet is actually about to enter upon said premises with such dredging machine and with large barges for the purposes of commencing such digging and dredging upon said premises, thus injuring and destroying this plaintiff's said oysters and oyster lands; and the defendant has repeatedly threatened and declared that he would continue the said digging and dredging until the said channel or canal is completely dug out to the irreparable injury of this plaintiff.

Eighth. That the digging of said channel or canal will destroy a large part of the aforesaid lands for oyster cultivation and will kill off the oysters, not only on the line of the said excavation, but for a distance of several hundred feet on either side of it by roiling the water and causing a large deposit of sand upon them, and this deposit will also render the lands unfit for oyster cultivation. The law affords no adequate remedy for the injuries to be done and threatened to this plaintiff as aforesaid.

7 Ninth. This plaintiff will suffer great and irreparable injury by reason of the threatened acts of the defendant unless he is restrained by order of this Court.

Wherefore, to the end that this plaintiff may not suffer irreparable injury, and to the end that it may have an adequate remedy for its grievances, this plaintiff prays judgment that the defendant, his agents, attorneys, servants and employees and all other persons under their direction or instigation, may be perpetually enjoined and restrained from entering upon said premises for the purpose of digging or dredging in the lands under the waters of the Great South Bay, covered by the aforesaaid leases, and from digging or dredging in or upon the said lands or any portion thereof for any purpose whatsoever, and from in any manner disturbing the said lands or the oysters growing thereon, and that this plaintiff may have such other and further relief, order or judgment in the premises as may be just and equitable, besides its costs of this action.

Dated November 2nd, 1906.

JOSEPH WOOD,
Attorney for Plaintiff.

STATE OF NEW YORK,
County of Suffolk, ss:

Charles H. Huntoon, Jr., being duly sworn, says, that he is the secretary of the Lewis Blue Point Oyster Cultivation Company, the plaintiff in the above-entitled action making the foregoing complaint; that he has read said complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true; that

8 this verification is made by deponent and not by the plaintiff because the plaintiff is a corporation and deponent is its secretary, and that the grounds of deponent's belief as to all matters not

stated upon his knowledge are statements made to deponent by the defendant J. Marvin Briggs.

CHARLES H. HUNTOON, JR.

Sworn to before me this 13th day of December, 1906.

DOW CLOCK,

[SEAL.] *Notary Public, Suffolk County, New York.*

Answer.

New York Supreme Court, Suffolk County.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY

vs.

J. MARVIN BRIGGS.

The defendant above named, by William J. Youngs, his attorney, for an answer to the amended complaint of the plaintiff herein, respectfully shows and states to this Court upon information and belief:

9 I.

The defendant denies that this Court has any jurisdiction either over the defendant or over the subject matter of the alleged cause of action stated in the amended complaint, for the reason that the decision in this action depends upon the construction of Article I, Section 1, Paragraph 3, of the Constitution of the United States and also the construction of an Act of Congress, to wit, the act known as the River and Harbor Act of June 13, 1902, and because this action is brought to restrain the improvement of navigation incident to the regulation of commerce over and above the navigable waters of the Great South Bay, which said improvement to navigation for the regulation of commerce is authorized by an Act of Congress.

And the defendant alleges that the original complaint in this action, which was served upon the defendant, states, among other things, in paragraph 7 of said complaint:

"That the defendant has been dredging in the said Great South Bay under contract with the United States Government for some months past, with a steam dredge, which is now at Patchogue, and on information and belief is under contract with the United States government for dredging a channel about 2,000 feet long and 200 feet wide, and 10 feet deep through the property of the plaintiff above mentioned."

And the defendant further alleges that the said allegation in said paragraph 7 of the original complaint herein is a true statement, and that it is the government of the United States and not this defendant which is the real party defendant in this action, and that by and under said admission of the plaintiff it appears that this Court

10 is without jurisdiction of the subject matter; and that the allegation above stated is omitted from the amended complaint,

with the intent to deceive the Court as to the real state of facts at the time of the beginning of this action.

II.

For a second, separate and distinct defense, while denying, as aforesaid, the jurisdiction of this Court, hereinbefore stated, the defendant herein respectfully shows and states to this Court:

(1) Defendant denies knowledge sufficient to form a belief as to whether or not the plaintiff is a domestic corporation, and therefore denies the same.

(2) Answering the second, third and fourth paragraphs of plaintiff's amended complaint herein, the defendant has no knowledge or information sufficient to form a belief as to the matters set forth in said paragraphs, and therefore denies the same; and the defendant further answering the second, third and fourth paragraphs of the plaintiff's amended complaint herein, upon information and belief alleges that whatever rights, title or claim of title, if any, the said Helen T. Smith, William Sidney Smith and Cornelia T. Smith, or Cornelia T. Smith and Thomas S. Strong, as general guardians of the said Helen T. Smith and William Sidney Smith, or this plaintiff as their tenant and lessee have in the premises mentioned in said second, third and fourth paragraphs of the amended complaint, in the Great South Bay, the same were at all the days and times mentioned in the amended complaint and for some time prior thereto and yet are entirely subservient and subject to the sovereign power and authority of the United States of America for the regulation of commerce and the improvement of navigation incident
11 thereto, and that the said United States of America, by reason of its sovereign power and its right of succession to the sovereign power of the crown of Great Britain, also made permanent by the cession of the sovereign rights of the several states constituting the United States of America, has a right at all times to enter into or upon said premises or any portion thereof, and to remove any and all obstructions, to regulate commerce between the United States and foreign nations and between the State of New York and other States in the Union, and for that purpose to improve the navigable capacity of the waters over and above the same, and that all and singular the acts and things alleged to have been done by this defendant in relation to the said lands under water described in the said second, third and fourth paragraphs of the amended complaint, were not done by him, but by the United States of America in its sovereign capacity, and that this defendant was the agent in that regard of the said United States of America, for the purpose of improving the navigation incident to regulating commerce upon the said lands under water mentioned in the said amended complaint herein, and all and several the acts and things done in the premises were done by the United States of America, as hereinbefore set forth, whose agents in that particular he was and is; and if, as alleged, the plaintiff staked and buoyed said lands and placed oysters thereon, it was and is at the risk and peril of the said plaintiff and with the knowledge of the plaintiff that the said United States had and

has the right to enter in and upon the same and to remove such stakes, buoys and other obstructions, for the improvement of navigation, to regulate commerce as aforesaid.

(3) The defendant also alleges that the third and fourth
12 paragraphs of the amended complaint are so indefinite and uncertain as to the period of time covered by the lease claimed by the plaintiff herein of the premises set forth in the amended complaint that this defendant is unable to determine whether this plaintiff has any interest in the subject matter of the alleged cause of action or not, and therefore denies the same.

(4) Defendant further avers that by the third and fourth paragraphs of the amended complaint, the plaintiff alleges a lease of the certain premises stated in the said amended complaint, and that the said lease, if any were made, was made subsequent to the Act of Congress, passed June 13, 1902, authorizing and directing the dredging of this land under water, complained of in the amended complaint, and that said lease, if any, and the rights of the lessees, if any, are subject and subservient to the provisions of the Act of Congress of June 13, 1902.

(5) And the defendant avers, upon information and belief, that the said leases mentioned in the amended complaint herein, dated on or about the first day of March, 1901, and any subsequent lease made on said premises and executed by Helen T. Smith, William Sidney Smith and Cornelia T. Smith, or Cornelia T. Smith and Thomas S. Strong as general guardians of Helen T. Smith or William Sidney Smith, to the plaintiff herein and the lands under water designated in said leases and particularly mentioned in paragraphs 3 and 4 of the amended complaint herein, were prior to and at the time of the making of said leases and yet are subject and subservient to servitude in respect to regulating commerce and the improvement of navigation incident thereto created in favor of the United States as a sovereign power under the Constitution for the purpose of regulating commerce and the improvement of
13 navigation incident thereto, and the said plaintiff well knew that fact at the time it accepted the said leases mentioned in the amended complaint herein.

(6) The defendant, answering the fifth paragraph of the amended complaint, denies any knowledge and information sufficient to form a belief as to whether or not the plaintiff entered into possession of the several tracts of land under water, and staked and buoyed the same, and therefore denies the same.

And defendant further avers that the staking and buoying of said several tracts of land under water, if any, as the plaintiff well knew at the time it accepted the said leases mentioned in the amended complaint herein, were subject and subservient to the servitude of the United States of America as a sovereign power under the Constitution, as hereinbefore set forth, at any time to cause the same to be removed for the purpose of regulating commerce and the improvement of navigation incident thereto, and that each and every act done by the plaintiff, as it then and there well knew, under the terms of the said leases or otherwise, was done subject to the servi-

tude of the United States as such sovereign power under the Constitution, as aforesaid, at any time to cause any of such stakes, buoys or any other personal property of any kind, nature or description whatsoever on said lands under water to be removed for the purpose of regulating commerce and the improvement of navigation incident thereto.

(7) Defendant further avers that he has no knowledge sufficient to form a belief as to whether or not the plaintiff herein planted oysters on the lands set forth in the amended complaint, as alleged therein, or spent in said work a large sum of money, or any sum of money and therefore denies the same.

14 (8) Defendant further denies that he has sufficient information on which to form a belief as to whether or not there is a large quantity of oysters or any oysters on said property of the value of five thousand dollars or any other sum and therefore denies same.

(9) Defendant further answering the amended complaint herein, denies knowledge sufficient to form a belief as to any of the allegations set forth in paragraph 5 of the plaintiff's amended complaint, and therefore denies the same.

(10) Defendant further answering, states that he has no knowledge sufficient to form a belief as to the truth of any of the allegations in the sixth paragraph of the plaintiff's amended complaint, and therefore denies the same; and upon information and belief defendant further denies that the plaintiff has now a very valuable crop of oysters planted and growing upon said lands.

(11) Defendant answering the seventh paragraph of the amended complaint herein, denies that he has been dredging in said Great South Bay with a steam dredge, and is now about to dredge a channel about 2,000 feet long and 200 feet broad and 10 feet deep through the property of the plaintiff, and, on the contrary, avers that the said acts complained of by the plaintiff were done by the government of the United States by virtue of its sovereign power and authority for the purpose of regulating commerce and the improvement of navigation, and that whatever was done by this defendant in the premises was done as the agent and servant of the said United States of America in that regard; and the defendant denies, upon information and belief, that the same was without lawful authority, and he avers, on the contrary, that all and singular the acts and things done by him were done by him as the agent of the

15 said United States and under the authority and direction of the government of the United States, whose agent, for the purpose, he was and is; and the defendant further, upon information and belief, denies that the several acts and things done by him as such agent as aforesaid in the premises were and are to the irreparable injury of the plaintiff, and avers, on the contrary, that whatever injury, if any, has been done to the plaintiff, has not been done by this defendant but by the United States by virtue of its sovereign power and authority, and that, as he is informed and believes, such damage, if any, is easily ascertainable and measurable in money damage.

(12) Defendant denies that he has sufficient information upon which to form a belief as to the facts stated in the eighth paragraph of the plaintiff's amended complaint, and therefore denies the same.

(13) Defendant denies that he has sufficient information upon which to form a belief as to the facts stated in the ninth paragraph of the plaintiff's amended complaint, and therefore denies the same.

(14) Defendant further denies each and every allegation stated in the amended complaint, except such as are herein admitted, denied or controverted.

III.

And for a third and separate defense herein, this defendant, repeating and realleging the denials in the first and second defenses herein contained, respectfully shows and states to this Court, upon information and belief, that the United States of America is a sovereign power, and that all navigable waters of the United States and land under the same are under the control of the United States for the purpose of regulating commerce and navigation, alike
16 between the United States and foreign nations and between citizens of the same State, and between citizens of the State of New York and other States, and that the title to the submerged soil in the Great South Bay, as well as the submerged soil under all other waters of the United States, whether in the individual States or individual owners under them, is subject to servitude in respect to navigation and commerce created in favor of the Federal government by the Constitution; that by virtue of its sovereign power, the said United States of America has vested in it and has the right to enter into and upon all the lands under water in the navigable streams, harbors, and waters of the United States, and particularly of the lands under the waters of the Great South Bay, as well as those mentioned in the amended complaint herein as all other lands under water in the Great South Bay, for the purposes of regulating commerce and the improvement of navigation incident thereto, and as such sovereign, has the right, under acts of Congress, to dig out and improve all of the said rivers, harbors and other navigable waters of the United States and to take for such purpose the soil under the said waters, and to remove therefrom any and all stakes, buoys or other personal property which are impediments to navigation or in any way obstruct or impede the improvement of the navigable capacity of such waters for the purpose of regulating commerce, for the purpose of deepening the channels and otherwise improving the navigable capacity of such streams for the purpose of regulating commerce, and to appropriate and expend money for such improvements, and to contract with such person or persons as it may deem proper for the purpose of making such improvements to the navigable capacity of
17 such waters as may be necessary for the regulation of commerce and the improvement of navigation in, over and above such waters, incident thereto; and that by virtue of such power and authority there was passed by the Fifty-seventh Congress of the United States an act known as the River and Harbor Act of June 13, 1902, which was duly approved by the President and thereupon

became a law of the United States, wherein and whereby it was, amongst other things, provided that for the dredging out of the Great South Bay from Fire Island Inlet to the Patchogue River there was appropriated the sum of sixty-six thousand dollars; and the control of the said appropriation was, by said Act of Congress, vested in the War Department of the United States and in the Engineer Department of said War Department; and that in conformity with and by virtue of said Act of Congress the government of the United States entered into a contract with this defendant, by a written agreement made, executed and delivered to this defendant on or about the 21st day of May, 1906, wherein and whereby this defendant was to furnish the labor and dredging plant and to dredge from the Great South Bay about 20,000 cubic yards of material, at the localities more particularly described in paragraph 36 of the specifications thereto attached, which localities were and are, among other localities, the same localities as those mentioned and described in the plaintiff's amended complaint herein as the lands under the water of the Great South Bay leased as aforesaid to the plaintiff, which said dredging and improving was directed to be done by the Act of Congress aforesaid, and was for the purpose of regulating commerce by improving the navigable capacity of the waters of the Great South Bay and providing a channel for the purposes of regulating commerce and the improvement of navigation from Fire Island Inlet to Patchogue River, above and through other lands under water in the Great South Bay as well as over, above
18 and through the lands mentioned in the amended complaint herein. And the defendant avers that he is, in this respect, the agent of the said government of the United States, to dredge out and deepen the channel of that portion of the Great South Bay, from Fire Island Inlet to Patchogue River, mentioned in the plaintiff's amended complaint herein, as well as other portions of said bay, for which authority was given to the United States Government by the Act of Congress aforesaid; and that he is lawfully in and upon the lands under water by virtue of the said contract made by the said United States with this defendant under the said River and Harbor Act of June 13, 1902, and that he has, by virtue of the said Act of Congress and the contract made by the United States with him as aforesaid, the legal right and authority to enter in and upon any of the said lands under water and all of the same, and to remove any stakes, buoys, or other personal property found thereon which will obstruct or impede the improvement to navigation for the regulation of commerce, without any let, hindrance or molestation on the part of this plaintiff or any other person or persons whatever, and that all and singular the acts and things done and intended to be done by him concerning which the plaintiff complains in the premises, were done as the servant and agent of the United States, by the authority and in accordance with the said contract and the Act of Congress aforesaid and under the direction and authority of the said United States of America, whose agent for that purpose he was and is, and, as the defendant is informed and believes, he has the right and it is his duty to do; and for the

reasons above stated this defendant further alleges that the plaintiff has no cause of action against the said defendant and that he is not properly made defendant in this action.

19 IV.

And for a fourth and separate defense herein, this defendant, repeating and realleging the denials in the first, second and third defenses herein contained, further answering, upon information and belief, avers that all and singular the acts allege to have been done and intended to be done in the premises by these defendants, as alleged in the amended complaint herein, were done by the United States of America as a sovereign power and in conformity with Article I, Section 1, Paragraph 3, of the Constitution of the United States, and also by virtue of the Act of Congress of June 13, 1902, known as the River and Harbor Act for the purpose of regulating commerce and for the improvement of the navigable capacity of the navigable waters of the United States, in the Great South Bay from Fire Island Inlet to Patchogue River, and avers that the plaintiff herein is unlawfully interfering with the action of the United States in its lawful power and authority to regulate commerce by improving the navigable capacity of the waters of the Great South Bay; and the defendant respectfully shows and states to this Court that by reason of the facts hereinbefore set forth in this fourth defense to the amended complaint herein, upon information and belief, he denies that this Court has any jurisdiction (1) to pass upon the acts alleged to have been committed and which are the basis of the alleged cause of action; (2) to interfere with, stop or in any way direct, control or affect any of the operations of acts alleged by the plaintiff against this defendant, or to make any order or judgment affecting or attempting to affect the same; (3) to grant any relief to the plaintiff or any other person with respect to the acts alleged to have been committed and operations alleged to be under way and contemplated by the said United States Government and this defendant.

20 Wherefore, the defendant demands that the amended complain- therein be dismissed, with costs.

WM. J. YOUNGS,
United States Attorney and Attorney for the Defendant.

Office and Post Office Address, Federal Building, Borough of Brooklyn, City of New York, N. Y.

STATE OF NEW YORK,
County of Kings, ss:

William J. Youngs, being duly sworn, deposes and says, that he is the United States Attorney for the Eastern District of New York and attorney for the above-named defendant; that he has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to

be alleged on information and belief, and as to those matters, he believes it to be true.

That the reason that this affidavit is verified by this deponent instead of the defendant is because the defendant is without the County of Kings.

That the source of your deponent's knowledge and the grounds of his belief are the Act of Congress of June 13, 1902, referred to in the foregoing answer, the contract between the United States and the defendant, J. Marvin Briggs, as well as other papers and records on file in deponent's office and in the office of the Chief Engineer of the War Department.

WM. J. YOUNGS.

Sworn to before me this 24th day of December, 1906.

PERCY G. B. GILKES,
Notary Public, Kings County, N. Y.

21 *Decision.*

At a Special Term of the Supreme Court, Held in and for the County of Suffolk, at the Place for Holding Special Term, in Patchogue, on the 20th Day of February, 1908.

Present: Hon. Walter H. Jaycox, Justice.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, Plaintiff,
vs.
J. MARVIN BRIGGS, Defendant.

The issues of fact raised by the answer of the defendant herein coming on to be tried before this Court at a Special Term held by the undersigned without a jury, upon an agreed stipulation and statement of facts, and after hearing Asa A. Spear, Esq., of counsel for the plaintiff, and William J. Youngs, Esq., attorney for the defendant, and due deliberation having been had, I do decide as follows:

Findings of Fact.

First. That at all times hereinafter mentioned, the plaintiff was and still is a domestic corporation, organized under the laws of the State of New York.

Second. That on or about the first day of March, 1901, Helen T. Smith and William Sidney Smith were and still are the
22 owners in fee simple of a tract of land under the waters of the Great South Bay, described in the second paragraph of plaintiff's amended complaint herein, subject to the dower right of Cornelia T. Smith, their mother, therein.

Third. That upon said date the said Helen T. Smith and William Sidney Smith were and still are the owners of an exclusive, private

right of fishery in the said portion of the Great South Bay, subject to the same dower right.

Fourth. That upon the said date the said Helen T. Smith and William Sidney Smith were both minors under the age of twenty-one years, and said Cornelia T. Smith and Thomas S. Strong were their duly constituted general guardians.

Fifth. That on or about the said first day of March, 1901, Cornelia T. Smith, individually, and the said Cornelia T. Smith and Thomas S. Strong, as general guardians of Helen T. Smith and William Sidney Smith, leased to the plaintiff by a lease in writing under their hands and seals on that day, and the said plaintiff took for the period of five years from the first day of April, 1901, which term has been further extended for a period of five years, for $103 per year, all that tract of land under the waters of said Great South Bay, described in the third paragraph of plaintiff's amended complaint herein, containing in all one hundred and three acres, for the purpose of planting, cultivating, growing and laying down oysters thereon.

Sixth. That on or about the first day of March, 1901, the said Cornelia T. Smith, individually, and the said Cornelia T. Smith and Thomas S. Strong, as general guardians of Helen T. Smith and William Sidney Smith, leased to the plaintiff, under a further lease in writing under their hands and seals on that day, and the
23 plaintiff took from said persons on the first day of April, 1901, for five years, which term has since been extended for a further period of five years, at an annual rent of $42, all that further tract of land under the waters of said Great South Bay, mentioned in paragraph four of plaintiff's amended complaint herein, containing in all forty-two acres, for the purpose of planting, cultivating, growing and laying down oysters thereon.

Seventh. That prior to the extension of the aforesaid leases, plaintiff wrote to the United States Engineer's office, New York, certain letters, marked Exhibits C and D in the stipulated case.

Eighth. That under the aforesaid leases the plaintiff entered into possession of the said lands under water, and staked and buoyed the same, and planted oysters thereon, expending in the said work a large sum of money; and that at the present time there are planted and growing upon said lands a large quantity of oysters, many of them ready for market and worth a considerable sum of money.

Ninth. That the oysters are the private property of the plaintiff, and the lands are valuable for the cultivation of oysters.

Tenth. That the defendant has been dredging in the Great South Bay with a steam dredge under and by virtue of a contract entered into between the government of the United States and the defendant, which said contract is dated May 21, 1906, and was made and executed by W. R. Livermore, the engineer in charge of said work, and before being restrained by this Court was about to dredge a channel increasing the depth of water from its present depth to the depth of ten feet over a surface two hundred feet broad and about two thousand feet long diagonally through the above-men-
24 tioned lands, and which said contract was made and entered into between the United States of America and said defend-

ant under and by virtue of the laws of the United States of America, known as the River and Harbor Act of June 16, 1902, which said law was passed by reason of a communication made by the Hon. Elihu Root, Secretary of War, to the Speaker of the House of Representatives, Fifty-sixth Congress, Second Session.

Eleventh. That prior to the time the defendant began to dig said channel as hereinbefore found, the plaintiff notified him to desist therefrom, and that he refused to do so, unless stopped by the Court.

Twelfth. That the digging of the said channel would destroy a large number of oysters on the lands aforesaid and would kill oysters of considerable value already planted upon the said lands, both along the line of said excavation and for a long distance on either side thereof.

Thirteenth. That the Great South Bay is situated in the County of Suffolk and State of New York, and is and was at all the times herein mentioned a navigable body of water and arm of the sea, over which registered and enrolled vessels may and do pass to and fro for the purpose of commerce between the States.

Fourteenth. That the oysters planted upon the said lands under water would not exceed in value the sum of five thousand dollars.

Fifteenth. That the digging of the said channel through the said land would very materially reduce its value for oyster cultivation.

Sixteenth. That Bar B, described in the defendant's contract and shown on Exhibit H, is embraced in the aforesaid leases, and that the channel which the United States Government has contracted with the defendant to cut would have cut diagonally through the premises described in said leases.

Seventeenth. That the above-named Helen T. Smith became twenty-one years of age on the 22nd day of August, 1902, and said William Sidney Smith became twenty-one years of age on the 21st day of February, 1904.

Eighteenth. That for upwards of two hundred years before an action in partition, conducted in the year 1900 and shown in the chain of title of plaintiff's lessors, in which Helen T. Smith and another by their guardians were plaintiffs and the Trustees of the Freeholders and Commonalty of the Town of Brookhaven et al. were defendants, the Smith family and the town of Brookhaven, at first singly, and after the making of the deeds mentioned in said chain of title, by joint action, managed and controlled the said bay and fishing rights therein as tenants in common, and continuously exercised ownership and control over the said bay and fishing rights by adopting rules and regulations respecting the taking of fish and oysters and for the planting of oysters by leasing the fishing rights and rights to cultivate oysters for longer or shorter terms and to many different people, by granting licenses to take fish, oysters and clams by maintaining actions for damages against persons violating said regulations and taking fish, oysters and clams without authority from the said Smiths and said town, by granting leases and licenses for the building of docks, also for gunning over the waters of said bay, in short, continuously exercised all the acts

of ownership and control possible for this class of property,
26 and derived therefrom a large annual revenue. That since the said partition suit down to the present time the said Helen T. Smith and William Sidney Smith and their guardians, until they became of full age, in conjunction with Cornelia T. Smith, their mother, have continued the same acts of ownership and control over the portion of the bay set apart to them, and which includes the premises described in the amended complaint, and over their said exclusive private fishery therein, and they now hold a large number of leases which they have made to many different persons for oystering and fishing rights in the bay, similar to the leases put in evidence, and derive a revenue of several thousand dollars annually therefrom.

Nineteenth. That neither the defendant nor the United States has acquired any right to enter by consent of the owners or of the plaintiff or by condemnation proceedings, to dig the said canal or channel, and both had full notice and knowledge of plaintiff's alleged claim to exclusive private fishery rights, and that the premises were the private property of plaintiff's lessors, subject to whatever rights, if any, the United States of America and its agents and employees may have under the Constitution and through acts of Congress, to dig a channel or canal through said premises, in the exercise of its power for the improvement of navigation and the regulation of commerce between the States.

Twentieth. That this is a proper action in equity for an injunction, unless the United States, under the provisions of its Constitution and laws applicable thereto, has a right to enter into and upon the said lands under water and fishing rights for the purposes of commerce and of improving navigation, without compensation to the plaintiff.

27 And I do decide as follows:

Conclusions of Law.

First. That the plaintiff's lessors are the owners in fee simple absolute of the portion of the soil in the Great South Bay described in the third and fourth paragraphs of plaintiff's amended complaint.

Second. That the plaintiff's lessors own an exclusive private right of fishery in the portion of the Great South Bay described in the third and fourth paragraphs of plaintiff's amended complaint.

Third. That the plaintiff is entitled to the exclusive possession, use and occupation of the premises described in the third and fourth paragraphs of plaintiff's amended complaint, and of the private fishery rights therein leased to it, subject to the right of the United States as found in the fourth conclusion of law herein.

Fourth. That the United States has a right which is paramount to the right of the plaintiff's lessors, to enter into and upon the said fishing rights and lands under water mentioned in the amended complaint herein for the purposes of commerce and the improvement of navigation, without compensation to the owners thereof or their lessee, the plaintiff herein.

Fifth. That the defendant, being the agent of and acting for and

on behalf of the United States Government by authority of a Special Act of Congress, stands as and for the government of the United States with the same rights therein for the purposes of carry-
28 ing on the improvements as authorized by the said Act of Congress, and as set forth in the pleadings and stipulations entered into herein.

I accordingly direct judgment for the defendant, dismissing the complaint on the merits and dissolving the injunction heretofore granted herein.

WALTER H. JAYCOX,
Justice of the Supreme Court of the State of New York.

(Endorsed:) Filed Feby. 25, 1908, at 11:30 a. m.—W. F. F., Clerk.

Judgment.

Supreme Court, Suffolk County.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, Plaintiff,
vs.
J. MARVIN BRIGGS, Defendant.

Judgment Feby. 25, 1908, at 11:30 a. m.

The issues in this case having been regularly brought on for trial before Mr. Justice Walter M. Jaycox at a Special Term of this Court held in the said County of Suffolk, New York, upon the pleadings and an agreed stipulation and statement of facts, and argument of counsel having been had thereon, and a decision having been duly made and filed on the 20th day of February, 1908, in favor of the defendant and against the plaintiff, containing the findings of fact and conclusions of law separately stated, and directing judg-
29 ment for the defendant, dismissing the complaint on the merits and dissolving the injunction heretofore granted herein,

Now, on motion of William J. Youngs, Esq., attorney for the defendant herein, it is

Adjudged, that the plaintiff's complaint herein be, and the same hereby is dismissed upon the merits, and that the injunction heretofore granted herein be, and the same hereby is dissolved.

Dated February 20th, 1908.

Enter, W. H. J., *J. S. C.*

WM. F. FLANAGAN, *Clerk.*

(Endorsed:) Filed Feby. 25, 1908, at 11:30 a. m.—W. F. F., Clerk.

Plaintiff's Requests.

Supreme Court, Suffolk County.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, Plaintiff,
against
J. MARVIN BRIGGS, Defendant.

The plaintiff respectfully requests the Court to find the following conclusions of law in the above-entitled action:

30 I. That the plaintiff's lessors are the owners in fee simple absolute of the soil under the waters of the Great South Bay covered by the plaintiff's leases.

Found. W. H. J., J. S. C.

II. That the plaintiff's lessors own an exclusive private right of fishery in the portion of said Great South Bay described in the amended complaint herein.

Found. W. H. J., J. S. C.

III. That the plaintiff is entitled to the exclusive possession, use and occupation of the premises described in its aforesaid leases and of the private fishery rights therein leased to it.

Refused. W. H. J., J. S. C.

IV. That the United States has no right which is paramount to the said rights of the plaintiff and its lessors to enter into and upon the aforesaid fishing rights and lands under the waters of the Great South Bay for the purposes of commerce and the improvement of navigation, without compensation to the owners thereof.

Refused. W. H. J., J. S. C.

V. That the United States has no right which is paramount to the said rights of the plaintiff and its lessors to enter into and upon the aforesaid fishing rights and lands under the waters of the Great South Bay for the purposes of commerce and the improvement of navigation, without compensation to the said plaintiff.

Refused. W. H. J., J. S. C.

VI. That the defendant, being a contractor with and acting
31 for and on behalf of the United States, has the same and no more rights respecting the said lands under water and fishing rights as the United States has.

Found. W. H. J., J. S. C.

I accordingly direct judgment for the plaintiff enjoining and restraining the defendant, his agents, attorneys, servants and employees, and all other persons under their direction or instigation from entering upon the aforesaid premises for the purpose of digging or dredging in the lands under the waters of the Great South Bay, covered by the aforesaid leases, and from digging or dredging in or upon the said lands or any portion thereof for any purpose whatsoever and from in any manner disturbing the said lands or the oysters growing thereon, until they shall have obtained lawful authority to do so, either by consent of the owners and said plaintiff,

or pursuant to the Statutes of the State of New York or of the United States in such case made and provided.

Refused. W. H. J., J. S. C.

32 *Exceptions.*

Supreme Court, Suffolk County.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, Plaintiff,
against
J. MARVIN BRIGGS, Defendant.

The plaintiff, The Lewis Blue Point Oyster Cultivation Company, takes the following exceptions to the decision of Mr. Justice Jaycox, made at Special Term in the above-entitled action, bearing date the 20th day of February, 1908, and filed in the office of the Clerk of Suffolk County on February 25th, 1908:

First. Said plaintiff excepts to that part of the conclusion of law numbered "Third," which is in the following words:

"Subject to the right of the United States as found in the fourth "conclusion of law herein."

Second. Said plaintiff excepts to the conclusion of law numbered "Fourth," and to each and every part thereof.

Third. Said plaintiff excepts to that part of said decision which is in the following words:

33 "I accordingly direct judgment for the defendant dismiss-
"ing the complaint on the merits and dissolving the injunc-
"tion heretofore granted herein."

Fourth. Said plaintiff further excepts to the refusal of the Court to find its proposed conclusion of law numbered III.

Fifth. Said plaintiff further excepts to the refusal of the Court to find its proposed conclusion of law numbered IV.

Sixth. Said plaintiff further excepts to the refusal of the Court to find its proposed conclusion of law numbered V.

Seventh. Said plaintiff further excepts to the refusal of the Court to direct judgment as requested by it.

Dated March 12th, 1908.

ASA A. SPEAR,
Plaintiff's Attorney.

Office and Post Office Address, 79 Wall Street, Borough of Manhattan, New York City.

To William F. Flanagan, Esq., Clerk of Suffolk County.
William J. Youngs, Esq., U. S. Attorney and Attorney for Defendant.

34 *Notice of Appeal.*

New York Supreme Court, Suffolk County.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, Plaintiff-Appellant,
against
J. MARVIN BRIGGS, Defendant-Respondent.

Notice of Appeal to Appellate Division.

GENTLEMEN: Please take notice that the plaintiff above named, The Lewis Blue Point Oyster Cultivation Company, hereby appeals to the Appellate Division of the Supreme Court, for the Second Department, from the judgment of this Court, rendered in this action in favor of the defendant, bearing date the 20th day of February, 1908, and entered in the office of the Clerk of the County of Suffolk, on the 25th day of February, 1908, whereby it was adjudged that the plaintiff's complaint herein be, and the same is hereby dismissed upon the merits, and that the injunction heretofore granted herein, be, and the same is hereby dissolved, and from the order entered herein on or about the said 25th day of February, 1908, whereby it was ordered and adjudged that the injunction order granted herein on the 7th day of November, 1906, and continued by the order made on the 17th day of December, 1906, be and the — hereby is
35 dissolved, and from each and every part of said judgment and order.

Dated March 12th, 1908.

Yours, etc.,

ASA A. SPEAR,
Attorney for Plaintiff-Appellant.

Office and Post Office Address, 79 Wall Street, Borough of Manhattan, New York City, New York.

To William F. Flanagan, Esq., Clerk of the County of Suffolk.
William J. Youngs, Esq., Attorney for Defendant and U. S. Attorney.

Stipulation of Facts.

New York Supreme Court, Suffolk County.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, Plaintiff,
vs.
J. MARVIN BRIGGS, Defendant.

It is stipulated that upon the trial of this action the following facts be accepted as proved on behalf of the parties hereto:
36 (1) That at all the times hereinafter mentioned, the plaintiff was and still is a domestic corporation, organized under the laws of the State of New York.

(2) That on or about the first day of March, 1901, Helen T. Smith and William Sidney Smith were and still are the owners in fee simple of a tract of land under the Great South Bay, as alleged in the second paragraph of plaintiff's amended complaint herein.

(3) That on or about the said first day of March, 1901, Cornelia T. Smith, individually, and the said Cornelia T. Smith and Thomas S. Strong, as general guardians of Helen T. Smith and William Sidney Smith, leased to the plaintiff by a lease in writing under their hands and seals on that day, and the said plaintiff took for the period of five years from the first day of April, 1901, which term has been further extended for a period of five years, for $103 per year, all that tract of land under the waters of said Great South Bay, described in the third paragraph of plaintiff's amended complaint herein, containing in all one hundred and three acres for the purpose of planting, cultivating, growing and laying down oysters thereon.

(4) That on or about the first day of March, 1901, the said Cornelia T. Smith, individually, and the said Cornelia T. Smith and Thomas S. Strong, as general guardians of Helen T. Smith and William Sidney Smith, leased to the plaintiff, under a further lease in writing under their hands and seals on that day, and the plaintiff took from said persons on the first day of April, 1901, for five years, which term has since been extended for a further period of five years, at an annual rental of $42, all that further tract of land under the waters of said Great South Bay mentioned in paragraph 4 of plaintiff's amended complaint herein, containing in all
37 forty-two acres, for the purpose of planting, cultivating, growing and laying down oysters thereon.

(5) That under the aforesaid leases the plaintiff entered into possession of the said lands under water, and staked and buoyed the same, and planted oysters thereon, expending in the said work a large sum of money, and that at the present time there are planted and growing upon said lands a large quantity of oysters, many of them ready for market and worth a considerable sum of money.

(6) That the oysters are the private property of the plaintiff, and the lands are valuable for the cultivation of oysters.

(7) That the defendant has been dredging in the Great South Bay with a steam dredge under and by virtue of a contract entered into between the Government of the United States of America and the defendant, which said contract is dated May 21, 1906, and was made and executed by the United States of America by the hands of W. R. Livermore the engineer in charge of said work, and before being restrained by this Court was about to dredge a channel increasing the depth of water from its present depth to the depth of ten feet over a surface two hundred feet broad and about two thousand feet long diagonally through the above-mentioned lands, and which said contract was made and entered into between the United States of America and said defendant under and by virtue of the laws of the United States of America, known as the River and Harbor Act of June 16, 1902, which said law was passed by reason of a communication made by the Hon. Elihu Root, Secretary of War, to the

Speaker of the House of Representatives, dated December 4, 1900, and the report of Major E. H. Ruffner, which said report and letter and communication is known as Document No. 103 of the
38 House of Representatives, Fifty-sixth Congress, Second Session.

(8) That prior to the time the defendant began to dig said channel as hereinbefore found, the plaintiff notified him to desist therefrom, and that he refused to do so, unless stopped by the Court.

(9) That the digging of the said channel would destroy a large number of oysters on the lands aforesaid and would kill oysters of considerable value already planted upon the said lands both along the line of said excavation and for a long distance on either side thereof.

(10) That the Great South Bay is situated in the County of Suffolk and State of New York, and is and was at all the times herein mentioned a navigable body of water and arm of the sea, over which registered and enrolled vessels may and do pass to and fro for the purpose of commerce between the States.

(11) That prior to the extension of the aforesaid leases, the plaintiff wrote to the United States engineer in charge a certain letter, which is dated October 25, 1902, and is marked Schedule C, and hereto annexed, a certain other letter dated July 7, 1903, which is marked Schedule D, and hereto annexed, and subsequently to the extension of said leases, a certain other letter, dated November 1, 1906, marked Schedule E, and hereto annexed, which three letters were received by the engineer at the time in charge of the work in the City of New York, and are offered and received in evidence.

(12) Defendant offers in evidence paragraph 7 of the original verified complaint of the plaintiff herein, which said seventh paragraph is hereto annexed as Schedule F. Plaintiff objects to the same as immaterial and incompetent, having been superseded by the amended complaint, and said Exhibit F is offered in evidence
39 subject to the objection of the plaintiff, and can be passed upon by the Court.

(13) That Schedule G hereto annexed is an abstract of the title under which plaintiff claims the right to the exclusive possession of the portion of the Great South Bay described in said leases and to an exclusive right of fishery therein, and all the instruments therein mentioned are offered and received in evidence.

(14) That the oysters planted upon the said land under water would not exceed in value the sum of five thousand dollars.

(15) That the digging of the said channel through the said land would very materially reduce its value for oyster cultivation.

(16) That Bar B described in the defendant's contract and shown on Exhibit H, is embraced in the aforesaid leases, and that the channel which the United States Government has contracted with the defendant to cut, would have cut diagonally through the premises described in said lease.

(17) That the above-named Helen T. Smith became twenty-one years of age on the 22nd day of August, 1902, and said William

Sidney Smith becames twenty-one years of age on the 21st day of February, 1904.

(18) That for upwards of two hundred years before an action in partition, conducted in the year 1900 and shown in the chain of title of plaintiff's lessors, in which Helen T. Smith and another by their guardians were plaintiffs and the Trustees of the Freeholders and Commonalty of the Town of Brookhaven et al. were defendants, the Smith family and the town of Brookhaven, at first singly, and after the making of the deeds mentioned in said chain of title by joint action, managed and controlled the said bay
40 and fishing rights therein as tenants in common, and continuously exercised ownership and control over the said bay and fishing rights, by adopting rules and regulations respecting the taking of fish and oysters and for the planting of oysters, by leasing the fishing rights and rights to cultivate oysters for longer and shorter terms and to many different people, by granting licenses to take fish, oysters and clams, by maintaining actions for damages against persons violating said regulations and taking fish, oysters and clams without authority from the said Smiths and said town, by granting leases and licenses for the building of docks, also for gunning over the waters of said bay, in short, continuously exercised all the acts of ownership and control possible for this class of property, and derived therefrom a large annual revenue. That since the said partition suit and down to the present time, the said Helen T. Smith, and William Sidney Smith, and their guardians, until they became of full age, in conjunction with Cornelia T. Smith, their mother, have continued the same acts of ownership and control over the portion of the bay set apart to them, and which includes the premises described in the amended complaint, and over their said exclusive private fishery therein, and they now hold a large number of leases which they have made to many different persons for oystering and fishing rights in the bay, similar to the leases put in evidence in this action, and derive a revenue of several thousand dollars annually from the same.

(19) That neither the defendant nor the United States has acquired any right to enter by consent of the owners or of the plaintiff or by condemnation proceedings, to dig the said canal or channel, and both had full notice and knowledge of plaintiff's alleged claim to exclusive private fishery rights, and that the premises were
41 the private property of plaintiff's lessors, subject to whatever rights, if any, the United States of America and its agents and employees may have under the Constitution and through the acts of Congress, to dig a channel or canal through said premises, in the exercise of its power for the improvement of navigation and the regulation of commerce between the States.

(20) The question for the determination of the Court is, has the defendant herein, under the terms of his contract entered into with the government of the United States, the right under the provisions of the Constitution and laws of the United States applicable thereto, to enter into and upon the said fishing rights and lands under water for the purposes of commerce and of improving navigation, without

compensation to this plaintiff. In other words, has the United States any right, which is paramount to the right of the plaintiff, to enter into and upon the fishing rights and lands under water mentioned in the complaint herein for purposes of commerce, without compensating plaintiff. If the Court should decide that the United States has no such paramount right, then it is conceded that this is a proper action in equity for an injunction.

It being the purpose of this stipulation of facts to get a judicial determination as to the rights of the respective parties herein and as to the rights and powers of the United States to enter into and upon lands under water in the Great South Bay for the regulation of commerce with foreign nations and among the several States and the improvement of navigation incident thereto.

42 SCHEDULE A.

(*Contract Between U. S. and J. Marvin Briggs.*)

1. This agreement entered into this twenty-first day of May, nineteen hundred and six, between W. R. Livermore, Colonel, Corps of Engineers, United States Army, of the first part, and J. M. Briggs, of New York in the county of New York, State of New York, of the second part witnesseth, that in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said W. R. Livermore, Colonel, Corps of Engineers, U. S. Army, for and in behalf of the United States of America, and the said J. M. Briggs, do covenant and agree, to and with each other, as follows:

That the said party of the second part shall furnish the necessary labor and plant and do the required dredging in Great South Bay, N. Y., to the amount of about $7,000 in accordance with the specifications hereto attached; and that the said party of the second part shall be paid for this work by the party of the first part at the rate of thirty-five (35) cents per cubic yard, based on scow measurement.

2. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as does not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

3. The said party of the second part shall commence, prosecute, and complete the work herein contracted for as set forth in paragraphs 31, 36 & 39 of the attached specifications.

43 4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with

the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States, in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise in accordance with the law.

44 5. It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, with the prior sanction of the Chief of Engineers, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period, to be determined by the said party of the first part. Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said party of the first part and deducted from any payments due or to become due the party of the second part: Provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work or delivering the materials within the period required by the contract, but such waiver of the time and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract.

6. If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in

the project, and this change or modification should involve such change in the specifications as to character and quantity,
45 whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

7. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

8. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

9. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agrees to hold
46 and save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

11. Payments shall be made to the said party of the second part as prescribed in paragraph 30 of the specifications hereto attached and forming part of this agreement.

12. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferrer or the transferee, but all rights of action for any breach of this contract by said J. M. Briggs are reserved to the United States.

13. No Member of or Delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.

14. This contract shall be subject to approval of the Chief of Engineers, U. S. A.

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witnesses:

ELLIOTT JONES, as to W. R. LIVERMORE,
Colonel, Corps of Engineers, U. S. Army.

J. E. BRIGGS, as to J. M. BRIGGS.

(Executed in triplicate.)

Approved: June 8, 1906.

A. MACKENZIE,
Brig. Gen., Chief of Engineers, U. S. Army.

47 *Specifications.*

30. Payments will be made monthly for all accepted work. A percentage of ten (10) per centum will be reserved from each payment until the completion of the contract.

31. The contractor will be required to commence work under his contract within fifteen (15) days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, unless otherwise directed by the Engineer Officer in charge, and to prosecute the said work with faithfulness and energy, and to complete it within the period stipulated in paragraph 39.

36. Great South Bay lies along the southern shore of Long Island. A map of the region, made from recent surveys, will be shown to prospective bidders as representing the conditions in general, but not in particular. The mean range of tide is about 1 foot.

The work to be done consists in dredging the channel where shoaling has occurred, to restore the channel to its original dimensions, 8 feet deep (at mean low water) and 100 feet wide, from deep water in the bay to Patchogue; and 10 feet deep and 200 feet wide through the bars, between the central basin and Fire Island Inlet. An allowance of one (1) foot for overdepth in dredging will be permitted. Natural side slopes due to falling in of the banks of excavation during dredging up to and not exceeding 1 on 3 will be allowed. In estimating for deductions for dredging done beyond limits and for overdepth in excess of one (1) foot the ratio between scow and prism measurement will be the same as stated in paragraph 49.

The material to be removed is believed to be mud, sand, gravel, and perhaps, bowlders, logs, etc. Bidders are expected to
48 examine the work and to decide for themselves as to its character and to make their bids accordingly, as the United States will not guarantee the accuracy of this description, nor of the map mentioned above.

The amount of money available for this work is about $7,000, and the quantity to be removed will depend upon the price bid.

The period followed for the completion of this work (see paragraph 39) is three (3) months.

39. Rate of Work and Time for Completion.—Work must be com-

menced and prosecuted as provided in paragraph 31. Each of the works must be completed within the period designated for completion (see paragraphs 35, 36 and 37), provided, that if one person or firm should be awarded more than one of the works, and may elect to do one work at a time, the total time allowed for completion of all will be the sum of the periods for each.

If at any time after the date fixed for beginning the work it shall be found that operations are not being carried on as rapidly as required by the contract, the Engineer Officer in charge shall have power after due notice in writing to the contractor to employ such additional plant or labor, or to purchase such material as may be necessary to insure the proper completion of the work within the time specified, and the excess of cost thereof over what the work would have cost at the contract rate shall be a charge against any sums due or to become due to the contractor. This provision, however, shall not be construed to affect the right of the United States to annul the contract.

49 SCHEDULE B.

Document No. 103, House of Representatives, 56th Congress, 2d Session.

Examination and Survey of Great South Bay and Patchogue River, New York.

WAR DEPARTMENT,
WASHINGTON, *December* 4, 1900.

SIR: I have the honor to transmit herewith a letter from the Chief of Engineers, United States Army, dated November 30 ultimo, together with reports of Maj. E. H. Ruffner, Corps of Engineers, dated August 20 and November 14, 1900, of a preliminary examination and survey, respectively, of Fire Island Inlet, in Great South Bay, to Patchogue River, New York, with a view to obtaining a channel not less than 10 feet in depth and 200 feet in width at mean low water, made in compliance with the emergency river and harbor act of June 6, 1900.

I concur in the conclusion of the Chief of Engineers.

Very respectfully,

ELIHU ROOT,
Secretary of War.

The Speaker of the House of Representatives.

50 OFFICE OF THE CHIEF OF ENGINEERS,
UNITED STATES ARMY,
WASHINGTON, *November* 30, 1900.

SIR: I have the honor to submit herewith copies of reports dated August 20 and November 14, 1900, by Maj. E. H. Ruffner, Corps of Engineers, upon preliminary examination and survey, respectively, of Fire Island Inlet, in Great South Bay, to Patchogue River, New York, with a view to obtaining a channel not less than 10 feet in depth and 200 feet in width at mean lower water, made to comply

with requirements of the emergency river and harbor act of June 6, 1900.

Major Ruffner presents a plan for improvement by dredging, with a view to obtaining a channel 10 feet deep and 200 feet wide from Fire Island Inlet to the central basin in Great South Bay, at mouth of Patchogue River, and thence 8 feet deep and 100 feet wide up the Patchogue River to Patchogue, at an estimated cost of $66,000, and $2,000 annually for maintenance.

In the opinion of Major Ruffner, concurred in by the division engineer, Col. G. L. Gillespie, Corps of Engineers, the channel from Fire Island Inlet to Patchogue, is worthy of improvement by the United States to the extent of the foregoing estimate.

Very respectfully, your obedient servant,

JOHN M. WILSON,
Brig. Gen., Chief of Engineers, U. S. Army.

Hon. Elihu Root, Secretary of War.

51 Preliminary Examination of Fire Island Inlet, in Great South Bay, to Patchogue River, New York, with a view to obtaining a channel not less than 10 feet in depth and 200 feet in width at mean low water.

Engineer Office, United States Army.

NEW YORK, N. Y., *August* 20, 1900.

GENERAL: The following report is submitted of a preliminary examination of "Fire Island Inlet, in Great South Bay, to Patchogue River, with a view to obtaining a channel not less than 10 feet in depth and 200 feet in width at mean low water," in compliance with Department letter dated June 13, 1900.

The examination was made on the 9th of August, through the courtesy of Messrs. E. Bailey & Sons, of Patchogue, the firm most interested in the proposed improvement. They supplied a small stern-wheel steamer used by them for tugging and lightering from vessels to their wharves in Patchogue River when the draft is too great to allow them to enter the river. This steamer took us to the inlet, and, following the channel, frequent soundings were taken.

The pilot evidently knew the depths very well, and pointed out the shoals, calling off the expected depths with great accuracy every time. The office chart of the bay furnished by the Coast and Geodetic Survey was at hand and was seen to be essentially correct, there being no reason for marked changes in depth or shifting of channel in the bay.

The subject of this improvement has been partly considered by my predecessor, the late Lieut. Col. W. H. H. Benyaurd, in his report of September 19, 1899 (House Doc. No. 133, Fifty-
52 sixth Congress, first session'), wherein he examined the question of an 8-foot channel over the same route. This is, however, a different question, and the reasons that led Colonel Benyaurd to report adversely do not affect this examination. The commerce of Patchogue River was reported as aggregating 13,325 round trips

of various vessels in the calendar year 1898, with an aggregate tonnage in all trips of 335,750. In a second report on the examination of "Patchogue River, with a view of securing a channel 10 feet deep at low water and 100 feet wide into the Great South Bay," by Colonel Benyaurd, under date of September 19, 1899, in House Doc. No. 171, Fifty-sixth Congress, first session,' the proposition is again discouraged of attempting to secure a channel of those dimensions; but later, under date of December 4, Colonel Benyaurd approved of the modification of the channel to 8 feet in depth by 100 feet in width.

The estimated cost of such improvement was $19,550 and an annual cost of $2,000 for maintenance. Colonel Benyaurd then states that the commerce in the river had increased from 56,000 tons in 1890 to 255,200 tons, with a value of $3,702,000 in 1898.

A list of vessels running to the port was given, with 35 names, drawing from 7 to 12 feet. A map accompanies the report, prepared from a survey of 1897, and this is printed with the document. It is now reported the increase in commerce continues, both in trips and in tonnage, and that for the calendar year 1899 a total of 348,000 tons of tonnage entered the river, the freight aggregating 266,800 tons, at an estimated value of $3,808,500.

A number of vessels, all small, are repaired or built at Patchogue for fishing and pleasure purposes. The following is a list of
53 vessels using the channel from Patchogue to Fire Island Inlet, with reported draft and commercial statistics for Patchogue for 1899:

(Here follows list of vessels.)

Great South Bay is a body of water on the south side of Long Island. It is some 30 statute miles long from its eastern end to where it changes its name to South Oyster Bay. It is about 5½ statute miles wide in its greatest extent, opposite Fire Island Light, to the shores of the villages of Bay Shore and Islip; its area is about 101 square miles. While it is generally shoal, there is a central basin about 21 statute miles long, with a depth gradually increasing from 6 feet to 10 feet, with some small areas with 12 and as much as 15 feet in depth, all at low water.

For a distance of about 10 miles there is a basin with 10 feet depth, quite regularly even and flat, sometimes deeper but not shallower, from a point about abreast of Patchogue River to a point about abreast of what is called Champlins Creek and a mile east of what is called Great Cove, which is the entrance to Islip and Bay Shore. There is no part of the south shore of Long Island more developed than this region, which is one continuous succession of villas, country places, villages, and summer resorts. Aside from the natural use of Great South Bay for oyster culture and for fishing, there is great use made of the region for pleasure purposes, sailboats and small yachts and fishing boats being found in great numbers. At the time the preliminary examination was made no less than 80 different craft, big and little, were in sight by actual count from the vicinity of Fire Island Inlet. No business is so profitable as a well-developed excursion and summer travel, and immense sums are expended in summer resorts, in pleasure visits, amuse-
54 ments, and sojourns in every available vicinity of the metropolis. To consider this commerce and to cater and provide for

it is as justifiable as to contemplate tonnage alone. The carriage of thousands of human beings is much more profitable than to convey hundreds of tons of freight. Such a business is not to be measured by records of freight received and shipped, but by number of craft used, their value, and capacity. At the same time it is to be noted that summer resorts make villages, villages invite general commerce and encourage manufactories, and freight and heavy draft vessels go, when they can, to such places.

At Babylon, Bay Shore, Islip, Great River, Oakdale, Sayville, Bayport, Patchogue, and Bellport freight can now be brought by water in this manner. A schooner may load to a draft of 12 feet and enter Fire Island Inlet.

Passing up the channel, deep water will be found to a distance of about 7 miles, or near Point of Woods. Coming to an anchor, the vessel would be partly unloaded until, drawing about 8 feet, it would be possible to pass over three shoals which have about 8 feet on them at low water. Having crossed these the vessel would be able to enter the central basin, having a least depth of 10 feet, and could go about 8 miles farther, or to within about 2 miles of Patchogue. Manifestly, the removal of the three shoals spoken of would not only benefit commerce intended for Patchogue, but also any intended for all points not far from the central 10-feet deep basin, i. e., from Bay Shore to Bellport.

This feature makes the difference between an examination to secure a depth of 10 feet and one to secure a depth of 8 feet to Patchogue. It naturally divides the subject into two parts. Dredging a channel through these three shoals would be equivalent to opening a 10-foot channel toward Patchogue some 8 miles long, and is manifestly a different thing from continuing that channel into the river itself. The channel thus secured might prove of more use than is now clearly seen, because the other villages might take advantage of a condition which brought vessels with as much draft as 10 feet so much nearer their doors. Every additional foot in draft of a coasting schooner means a considerable increase in capacity.

Conditions in the bay should be quite stable; there are no marked shoals; the change from shore to center is gradual. The depth is not great enough anywhere to permit of the generation of waves of great destructive power. The greatest depth being only from 13 to 15 feet, there is no likelihood that a channel as deep and as wide as proposed (200 feet at bottom, 11 feet deep, side slopes 12 horizontal to 1 vertical) would be affected by such storms as might arise. The conditions would be different in a shallower channel, say 6 to 8 feet, on the bay shores, where the waves of translation coming from the central deeper water might easily fill up such a shallow trench. Frail structures on the shores of the bay are easily injured, and although ice accumulates at times and does injury to the shores, it can not do damage to a deep channel.

All conditions point to the desirability of a deep, wide channel for permanence.

The charts of the Coast and Geodetic Survey indicate quite closely the probable amount of dredging necessary to secure such a chan-

nel as is suggested through the shoals from Point of Woods to the central basin. From these it is estimated that about 50,000 cubic yards should be removed to obtain the depth and width intended. If a more accurate survey be desired, it could be made from funds on hand of the unexpended balance of former appropriations for improvement of Patchogue River, at a cost of about $450.

56 I deem the project worthy of improvement by the United States and recommend that the survey be authorized.

From Patchogue to the depth required in the bay we have data sufficient to make an estimate of cost. The change in depth here is so regular that the limit of error possible is slight.

It might be desirable to recommend a variation in depth of channel when the vicinity of Patchogue is reached. Vessels drawing 10 feet, reaching within 2 miles of Patchogue, might be lightered some 2 feet and then enter on a draft of 8 feet, and there would be a great saving. I am not prepared to state as to this as yet, until the survey of the outer shoals is finished. To secure a channel of 10 feet depth, 200 feet wide to the entrance and 100 feet wide above, into Patchogue River, would require the dredging of about 400,000 cubic yards through a distance of some 2 miles in the bay and 1 mile in the river.

To secure a channel of only 8 feet depth into the river would require the dredging of 85,000 cubic yards, the width being only 100 feet. This is the estimate submitted by my predecessor. The present examination does not call for an estimate reaching into the river, but the whole matter would not be intelligible should the report stop at the river entrance; hence I shall consider the requirement to be not only to the entrance, but to the wharves. Outside the river the width should be greater than 100 feet, and if 200, then the estimate for an 8-foot channel is to be increased to 130,000 cubic yards. This difference between 400,000 cubic yards and 130,000 cubic yards is so great that an adherence to the greater one might completely invalidate the whole idea of the improvement: hence I have thought it advisable only to consider the channel of 8 feet depth from the central 10-foot depth basin to and into the river, knowing that, should commerce demand it, the channel could later be deepened.

57 With this explanation, I report that the improvement is one that should be undertaken by the United States, and recommend that a survey be made of the shoals between the central basin and the Fire Island Inlet.

The entrance to Fire Island Inlet is so narrow and crooked that the tidal flow is greatly contracted. Doubtless, were a system of jetties properly placed and the channel dredged, the entrance could be made much wider and the tidal inflow much increased, resulting in a subsequent deepening of the entrance to much greater dimensions than at present, the whole to the betterment of the bay and its commerce. This is not before us now, but it can do no harm to speak of the possibilities of such a project.

I inclose a copy of Coast Survey chart[1] of the Great South Bay,

[1]Not printed.

with the proposed dredging through the three lower shoals marked with red lines and the entrance to Patchogue River with one long red line.

Respectfully submitted,

E. H. RUFFNER,
Major, Corps of Engineers.

Brig. Gen. John M. Wilson, Chief of Engineers, U. S. A. (Through the Division Engineer.)

[First indorsement.]

NORTHEAST DIVISION ENGINEER OFFICE,
NEW YORK, *August* 22, 1900.

Respectfully forwarded to the Chief of Engineers, concurring in the recommendation of the district officer regarding a survey between the central basin of South Bay and the Fire Island Inlet.

G. L. GILLESPIE,
Colonel, Corps of Engineers, Division Engineer.

58 [Second indorsement.]

OFFICE CHIEF OF ENGINEERS,
U. S. ARMY, *August* 28, 1900.

Respectfully submitted to the Secretary of War.

This is a report upon preliminary examination of Fire Island Inlet, in Great South Bay, to Patchogue River, New York (full text of item quoted within), required by the provisions of the emergency river and harbor act of June 6, 1900.

The local engineer is of opinion that improvement of the channel from Fire Island Inlet to the central basin in Great South Bay to a depth of 10 feet and width of 200 feet is a work worthy of being undertaken by the General Government, and he recommends that a survey be made with a view to preparation of plan and estimate of cost of such improvement. He is also of opinion that the locality between the central basin and the Patchogue River and thence up to the wharves at Patchogue is worthy of being improved, possibly to the extent of securing a channel, say, 8 feet deep, with width greater than 100 feet outside the river and of 100 feet inside.

Inviting attention to the views of the division engineer, in preceding indorsement, I recommend that a survey be authorized and plans and estimates of cost be prepared in accordance with the views of the local engineer, from the results of which an opinion may be formed as to the extent of improvement that may be justified by the commerce involved.

JOHN M. WILSON,
Brig. Gen., Chief of Engineers, U. S. Army.

59 [Third Indorsement.]

WAR DEPARTMENT, *August* 30, 1900.

Approved as recommended by the Chief of Engineers.

ELIHU ROOT,
Secretary of War.

Survey of Fire Island Inlet, in Great South Bay, to Patchogue River, New York.

ENGINEER OFFICE, UNITED STATES ARMY,
NEW YORK, N. Y., *November* 14, 1900.

GENERAL: In compliance with instructions contained in letter from the Chief of Engineers dated September 1, 1900, I have the honor to submit the following report upon a survey, with plan and estimate prepared, to comply with the terms of the river and harbor act approved June 6, 1900.

The survey consisted principally in sounding the three shoals mentioned in my report upon preliminary examination dated August 20, 1900, lying between the central basin of Great South Bay and Point of Woods, Fire Island, to which point, a distance of 7 miles, the deep channel in through Fire Island Inlet extends. The report upon preliminary examination contains a full description of the body of water now under consideration. Soundings were also made throughout the remainder of the water route followed by pilots from Point of Woods to Patchogue to verify the depths shown on the United States Coast Survey map, which is used as the basis
60 of this survey, but no attempt has been made to correct the chart outside of the limits of the channel.

The results of the survey are exhibited on the accompanying map. The general map of Great South Bay is copied mostly from a map furnished this office by the Superintendent of the United States Coast and Geodetic Survey on September 8, 1899, and below are shown the shoal areas sounded on a larger scale, with their location shown on the general map outlined by a broken line and lettered to correspond.

The mean range of tides at Patchogue and at the bars sounded is 1 foot.

No improvement has ever been made in Great South Bay by the United States. Patchogue River was improved by dredging and jetty construction under a project commenced in 1890 and completed in 1897, so as to make the channel about 60 feet wide and 6 feet deep at mean low water, at a total cost of $40,000. Details as to this improvement may be found in the Annual Report of the Chief of Engineers for 1897, Part I, page 1108.

The areas to be dredged to secure depths of 10 feet, mean low water, from Fire Island Inlet to the central basin in Great South Bay and 8 feet into Patchogue River to Patchogue are shown on the accompanying map, outlined and shaded in red. The estimates are designed to cover the work necessary to make the channel of the depths named from Fire Island to Patchogue to be 200 feet wide to Patchogue River, and 100 feet wide in the river.

(Here follow tables, giving estimates as to the cost of dredging, and giving vessels, with tonnage, etc., using channel.)

In view of the increase in commerce, and of the fact that the depth of water is insufficient for the vessels which use it, I am of

the opinion that the channel from Fire Island Inlet to
61 Patchogue is worthy of improvement by the United States to the extent of the foregoing estimate.

Very respectfully, your obedient servant,

E. H. RUFFNER,
Major, Corps of Engineers.

Brig. Gen. John M. Wilson, Chief of Engineers, U. S. A. (Through the Division Engineer.)

[Third Indorsement.]

NORTHEAST DIVISION ENGINEER OFFICE,
NEW YORK, *November* 22, 1900.

Respectfully returned to the Chief of Engineers, concurring in the recommendation of the district officer for an improvement providing for a channel through South Bay 200 feet wide and 10 feet deep, and into Patchogue River a channel 100 feet wide and 8 feet deep, at an estimated cost of $66,000, with an annual maintenance of $2,000.

The tonnage of this waterway has increased from 56,000 tons, having a value of $650,000, in 1890, to 266,800 tons, with a value $3,808,500, in 1899.

In my opinion the harbor and river are worthy of improvement to the extent of the estimate stated.

G. L. GILLESPIE,
Colonel, Corps of Engineers, Division Engineer.

62 SCHEDULE C.

The Lewis Blue Point Oyster Cultivation Company.

SAYVILLE, L. I., N. Y., *Oct.* 25, 1902.

Mr. H. C. Wilson, Assistant Engineer, Army Department, 39 Whitehall St., New York City, N. Y.

DEAR SIR: At a meeting of the directors of The Lewis Blue Point Oyster Cultivation Co. held on Oct. 24th, 1902, the unanimous feeling of the directors was of regret that it has been found necessary to dig a channel through a portion of the most valuable part of our Oyster ground, thereby depriving us of the use of it for probably the balance of the term of our lease, which has very nearly 3½ years yet to run. But as it is not the wish of this Company to try to hinder any improvement that may be for the public benefit, it was decided by said directors to permit the dredging of said channel through the portion of the ground pointed out by you to our Mr. Skinner, providing that you will give this Company a written agreement that the work shall be done on the part named on your map as Plot B, from March 15th, 1903, to April 15th, 1903, and that the digging shall only be done in such part as may be mutually agreed upon and

marked out by a member of our Company and a representative of the Army Department, and that it shall be dug only to a uniform depth of ten (10) ft. at low water, and that said digging shall be commenced at where there now is a ten (10) foot depth and ending where the depth is now ten feet and to compensate us for the loss of the use of this valuable portion of our oyster ground, that you will have as much of the dug material from this and other
63 parts of your digging distributed in such quantities as we may wish on such parts of our Oyster ground as we shall designate, and under our supervision, and that there shall be no charge whatever made on this Company for any of such work as may be done.

Yours truly,

THE LEWIS BLUE POINT OYSTER CULTIVATION CO.,
Per JAMES HERRING, *Secty.*

SCHEDULE D.

The Lewis Blue Point Oyster Cultivation Company,

SAYVILLE, L. I., N. Y., *July 7th*, 1903.

Lieut. Slattery, Room 5, Army Bldg., 39 Whitehall St., N. Y.

DEAR SIR: Confirming what I told you yesterday will say that should the Dredging Company dig into our Oyster grounds marked on your chart as Plot "B" it would cause us an immediate loss of $6,000.00 worth of Oysters, and would destroy 72 acres of our very best Oyster Ground, as it would cut through the very best part of same leaving the strips on each side entirely valueless to us, and as our leases for that tract have 2½ years yet to run, we should be debarred from use of the ground for that time, which would be a loss to our business of $4,000. Causing all told a loss to us of $10,000.

We hope that you have written to the Dredging Company ordering them not to do any digging on Plot "B" as if through
64 some carelessness or misunderstanding they should start on that plot, they could cause a loss of a thousand dollars in one day. Kindly do your best to get the Colonel to abandon the digging in that part altogether, and inform him that Assistant Engineer H. C. Wilson promised and agreed that Plot B should not be touched. I have seen some of the parties to-day who were witnesses to such agreement.

Yours truly,

THE LEWIS BLUE POINT OYSTER CULTIVATION CO.,
Per JAMES HERRING, *Supt.*

SCHEDULE E.

The Lewis Blue Point Oyster Cultivation Company.

SAYVILLE, L. I., N. Y. *Nov.* 1/06.

Col. D. W. Lockwood, Colonel, Corps of Engineers, U. S. A., New York City.

DEAR SIR: We understand that the company who have the contract for dredging in the Great South Bay are now preparing to start work on that part designated as "Bar B." In 1903 when it was first proposed to do this work and again in August of the present year we entered a protest to Col. Livermore, asking that this part of the work be abandoned. In both instances as above stated the dredge was ordered from that location and we were advised that the work would not be done.

65 Our position in regard to this matter is the same now as before and we herewith enter protest for the following reasons. Should this work on our oyster grounds be carried out it would cause us an immediate loss of $10,000.00 worth of oysters on that ground. It would also destroy 72 acres of oyster ground, as it would cut through the best part of same leaving strips on each side entirely valueless to us. As our leases for this tract do not expire for 4½ years we would be debarred from use of the ground for that time which would be a further financial loss of considerable amount.

Also on account of the nature of the bottom in that locality which is a light sand, and if disturbed would be carried by the swift tide to adjoining oyster beds leased by us and others destroying thousands of bushels of oysters now planted there.

It is the opinion of persons here, who are in a position to know, that there is no immediate necessity for deepening the natural channel at the point in question, as it has never been considered advisable for vessels drawing more than 8 ft. of water to come into the Great South Bay over Fire Island Bar. The water at the point where it is proposed to dig is about 8½ ft. deep.

We trust that you will give this matter your immediate attention and decide not to have the work carried out at the point in question.

Respectfully yours,

THE LEWIS BLUE POINT OYSTER CULTIVATION CO.
C. H. HUNTOON, JR., *M'g'r.*

66 SCHEDULE F.

Paragraph Seven of Plaintiff's Original Complaint.

Seventh. That the defendant has been dredging in the said Great South Bay under contract with the United States Government for some months past with a steam dredge which is now at Patchogue and upon information and belief is under contract with the United

States Government for dredging a channel about 2000 feet long and 200 feet broad and 10 feet deep through the property of the plaintiff above mentioned and prior to the commencement of this action the defendant has repeatedly threatened to commence the said dredging across the said premises although the defendant has no authority whatever or consent of the owners of the said premises nor of the plaintiff to do so and has no lawful authority to do so but has full knowledge that this plaintiff has leased the premises above named and occupies the same for the purpose above mentioned and has planted the same with oysters and has a large and valuable quantity of oysters there growing and has been expressly prohibited by this plaintiff and the owners of said lands, from so doing; and is actually about to enter upon said premises with a steam dredging machine and large barges and is about to commence digging up the bottom of the said Great South Bay, upon the portion thereof, above described, owned as aforesaid and held and planted by this plaintiff as aforesaid, with the avowed purpose of digging a channel or canal upon and through the same, of the dimensions above set forth and removing the material so dug up, in said barges, thus injuring and destroying this plaintiff's said oyster lands and the defendant has repeatedly threatened and declared that he would continue the said digging until the said channel or canal is completely dug out to the irreparable injury of this plaintiff.

67 SCHEDULE G.

Chain of Title.

The plaintiff, to sustain its right to the exclusive possession of the portion of the Great South Bay described in the amended complaint and to the exclusive private fishery therein claimed, introduced the following evidence:

Royal Patent from Richard Nichols, Governor-General under his Royal Highness, James, Duke of York and Albany, &c., of all his Territories in America, unto John Tucker and others, as Patentees, for and on behalf of themselves and their associates, the Freeholders and Inhabitants of the Town of Brookhaven, dated March 7th, 1666.

The Patent.

Richard Nicolls, Esq., Governor Generall, under his Royal Highness, James Duke of Yorke, and Albany, &c., of all his Territoryes in America. To all to whome these Presents shall come, sendeth Greeting: Whereas, there is a certaine Towne in the East Riding of Yorkshire, upon Long Island, commonly called and knowne by the name of Brooke Haven, and heretofore by the Indyan name of Setaulcott, now in ye Tenure or occupation of severall Freeholders and Inhabitants, who having heretofore made Lawfull Purchase of the Lands, thereunto belonging, have likewise manured and Im-

proved a considerable part thereof, and settled a competent number of familyes thereupon; Now for a confirmation unto the sd Free holder and Inhabitants in their Enjoyment and Possession of the premisses. Know ye, that by vertue of the commission, and Authority unto mee given by his Royall Hightness, I have Ratified, Confirmed and Graunted, And by these presents, Do Ratify,
68 Confirme and Graunt unto Capt. John Tucker, Mr. *Mr.* Daniell Lane, Mr. Richard Woodhull, Henry Perring and John Jenner, as Patentees, for and on behalfe of themselves and their Associates, the Freeholders and Inhabitants of the said Towne of Brookehaven, theires heires, Successorsand Assignes, all that Tract of Land, which already hath beene or that hereafter shall be Purchased, for and on the behalfe of the said Towne, whether from the native Indyan Proprietors, or others within the Bounds and Limitts, hereafter sett forth and expre t: (Vizt,) that is to say, the west Bounds to begin at the Line run by the Inhabitants of the said Towne, between them and Mr. Smith's lands, of Nesaquake, as in his Patent is sett forth, and to go East to the head of the Wading River, or Redd Creeke, from whence as also from their west Bounds, to stretch North to the Sound, and South to the Sea or Maine Ocean. All which said tract of Land, within the Bounds and Limitts aforesaid, and all or any Plantations there upon, from henceforth are to belong and appertaine to the said Towne; Together with all Havens, Harbours, Creekes, Quarrys, woodlands, meadows, Pastures, marshes, waters, Rivers, Lakes, ffishing, Hawking, Hunting and ffowling, And all other Profitts, Commoditves, Emoluments and hereditaments, to the said Land and premisses within ye Limitts and Bounds afore mentioned described, belonging, or in any wise appertaining; To have and to hold, all and singular, the said Lands, Hereditaments and premisses, with their and every of theire appurtenances, and of every part and Parcell thereof, to the said Patentees and their Associates, their heires, Successors and Assigns, to the proper use and behoofe of the said Patentees, and their Associates, their heires, Successors and Assigns, forever.

Moreover, I do hereby Ratify, Confirme and Graunt unto
69 the said Patentees and their Associates, their heires, Successors and Assigns, all the Priviledges belonging to a towne within this Government. And that the place of their present Habitation shall continue and retaine the name of Brooke-Haven, by which name and Stile it shall be distinguished and knowne, in all Bargaines and Sales, Deedes, Records and writings: They, the said Patentees, and their Associates, their heires, Successors and Assigns Rendering and Paying such Dutyes and Acknowledgmts as now are, or hereafter shall be Constituted and Establisht by ye Lawes of this Government, under the obedience of his Royall Highness, his heires and Successors: Given under my hand and Seale, at Fort James, in New Yorke, the 7th day of March, in the 19th yeare of the Raigne of our Soverayne Lord, Charles the Second, by the grate God, of England, Scotland, France and Ireland, King, Defender of the faith, &c., And in the year of our Lord God, 1666.

RICHARD NICOLLS.

Recorded, by order of the Governor, the day and yeare above written.

MATHIAS NICOLLS, *Sec'y.*

Royal Patent from Thomas Dongan, Captain General, Governor-in Chief and Vice Admiral in and over the Province of New York and Territories Depending Thereon, in America, Under His Majesty, James the Second, by the Grace of God, of England & Scotland, France & Ireland, King, Defender of the Faith, &c., to John Palmer and others, Freeholders and Inhabitants of the Town of Brookhaven, Dated December 27th, 1686.

Second Patent.

Thomas Dongan, Capt. Generall, Govenour in chief, and vice Admirall, in and over the province of New York and terri-
70 toryes depending thereon in America, under his majesty, James the Second, by the grace of God, of England & Scottland, France and Ireland, King, Defender of the faith &c., to all whome this shall come, sendeth greeting, Whereas, Richard Nicolls, esquire, Governour-Genll. under his then Royall High'ss, James, Duke of Yorke and Albany, &c., now his present Majesty, of all his territoryes in America, did by a certaine writeing or pattent, under his hand and seale, bearing date the seventh Day of March, in the nineteenth Year of his Reigne of our late Soverigne Lord, Charles the Second, &c., of blessed memory, and in the yeare of our Lord God, one thousand six hundred Sixty six, by virtue of the Commission and Authority unto him given by his then Royall High'ss, now his present majesty, as Aforesaid, Ratifie, Confirme, and Grant unto Capt. John Tucker, Mr. Daniel Lane, Mr. Richard Woodhull, Henry Perring and John Jennor, as Patentees for and on the behalfe of themselves and there associates, the freeholders and Inhabitants of the towne of Brookhaven, Scituate, lyeing & being in the east rideing of Yorkshire, upon Long Island, and heretofore knowne by the Indian name of Seataulcott, their heires, successors and assignes, All that tract of land which already hath been, or that hereafter shall be purchased, for and on behalfe of the said towne, whether from the native Indian proprietors or other, with the bounds and Limitts hereafter sett forth and exprest, that is to say, the west bounds to begin at the line run by the Inhabitants of the said towne, betweene them & Mr. Smith's lands, of Nesaquake, as in his is sett forth, & to go east to the head of the wading river or redd Creeke, form whence as also from their west bounds to stretch north to the Sound, and south to the sea or maine Ocean, all which said tract of land within the bounds and
71 Limitts, and all or any plantations thereupon, from henceforth, are to belong and appertaine, to the said towne, together with all havens, harbors, Creeks, Quarries, woodlands, Meadows, pastures, Marshes, Waters, Rivers, Lakes, fishing, hawking, hunting and fowling; And all other proffitts, Commoditys, emoluments & hereaditaments to the said lands and premissess within the

limitts & bounds aforementioned Described, belonging or in any wise appurtaineing, to have And to hold, all and singuler, the said lands, hereaditaments & premissess; with their & every of their appurtenances, and of every parte and parcell thereof, to the said pattentees, and their Associates, their heires, Successors, assignes, to the proper use & behoofe of the said pattentees, and their Associates, their successors, and Assignes, forever. Moreover, the said Richard Nicolls, esquire, Governor Generall aforesaid, did thereby Ratifie and confirme unto the said pattentees & their Associates, and their heires, successors & Assignes, all the priviledges belonging to A towne within the government, and that the place of their present habitation shall continue & retaine the name of Brookhaven, by which name and stile it shall be Distinguished & knowne in all bargaines & Sales, Deeds, Records & writings, they, the said pattentees, Their Associates, their heires, successors & Assignes, Rendering & paying such dutyes & Acknowledgments as now are or hereafter shall be constituted & establisht by the laws of this Governm't, under the obedience of his Royal Highness, his heires and successors, as by the said patent Recorded in the Secretarye's office for this province, relation being thereunto had may more fully and at large appear, And Whereas, Mr. Andrew Gibb and Mr. Thomas Jenner, some of the freeholders of the said towne of Brookhaven, at the request of the rest of the freeholders of said towne, have made applycation unto me; that I would confirme the premissess by pattent, under
72 the seale of the province: Now, Know Yee, that I, the said Thomas Dongan, by virtue of the power and authority to me, Derived from his most sacred Majesty Aforesaid, and In pursuance of the same, for and in consideration of the Quitt Rent herein after reserved, & other good & Lawfull considerations me thereunto moving, have given, granted, ratified, released and confirmed, And by these presents doe give, grant, ratifie, release & Confirme unto John Palmer, Richard Woodhull, Samuell Euborne, Andrew Gibbs, William Satterly, Thomas Jenner and Thomas Helmeres, freeholders & Inhabitants of Brookhaven, hereinafter recited, and made one body, corporate & Politique, & willed & determined to be called by the name of the Trustees of the freeholders & Comonalty of the towne of Brookhaven, and they and their successors, All the above cited tracts within the limitts and bounds aforesaid, together with all and in singular, the houses, messuages, tenements, buildings, Mills, Milldams, fencings, enclosures, Gardens, Orchards, fields, pastures, woods, underwoods, trees, timber, feedings, comon of pasture, Meadows, Marshes, Swamps, plaines, rivers, rivoletts, waters, lakes, ponds, brooks, streams, beaches, quarries, mines, mineralls, creeks, Harbors, highways and easements, fishing, hawking, hunting & fowling, (silver and gold mines excepted), And all other franchises, profitts, Commoditves & hereditaments whatsoever, to the said tracts of land & premises, belonging and in any wise appurtaining or therewith used, Accepted, or taken to belong, or in any wise to appertane to all intents, purposes & constructions Whatsoever, as also all and singular, the Rents, Arrearages of Rents, usages and profitts of the said tract of land and premisses, heretofore due and payable.

To have and to hold all the before recited tract of land & premises,
with their and every of their appurtenances, unto the said
73 John Palmer, Richard Woodhull, Samuell Eburne, Andrew
Gibbs, William Satterly, Thomas Jenner & Thomas Helmne,
trustees of the freeholders & comonalty of the towne of Brookhaven,
and their Successors forever, to and for the severall & Respective uses
following and to no other uses, intents & purposes whatsoever, that is
to say, as for & concerning all and singular, the severall & respective
parsells of lande & meadow, part of the Granted premisses in any
wayes taken up and appropriated, either by pattent under the hand
of any of his Majestyes Governours in this province, and sealed with
the seale thereof, or by perticuler divisions and Allotments before
the day of date nereof, unto the Severall & respective present free-
holders or Inhabitants of the said towne of Brookhaven, by virtue of
the aforecited Deed or pattent, to the use and behoofe of the said
freeholders or inhabitants respectively, & their severall & respective
heires & assignes forever. And as for and concerning all and every
such parcell or parcells, tract or tracts of land, Remainder of the
granted premissess, not taken up or appropriated to any perticuler
person or persons, by virtue of the Afore-recited deed or pattent, to
the use and behoofe of the present freeholders & inhabitants, their
heires, Successors and Assigns forever, in proportion to their Severall
& respective Settlements, Divisions & Allottments, as tennants in
comon, without any lett, hindrance or molestation to be had or re-
served, upon pretence of joint tennancy or survivorship any thing
contained herein to the contrary in any wise notwithstanding, allways
saving unto his most Sacred majesty aforesaid, his heires and suc-
cessors the severall Rents & Quitt Rents reserved, due & payable, from
severall persons inhabiting within the limitts & bounds aforesaid,
by virtue of former grants, to them made and given, and also saveing
to his most sacred majesty Aforesaid, his heires & Successors,
74 all the tracts & necks of land that lye to the South, within
the limitts and bounds aforesaid, that remaine unpurchased
from the native Indians, any thing contained herein to the contrary
in any wise notwithstanding, to be holden of his said Majesty, his
heires and successors in free & common soccage, According to the
mannor of east Grenwich, in the county of Kent, within his majestyes
Realme of England, yeilding, Rendring, & Paying therefore, yearly,
& every year from henceforth, to our sovereigne Lord the King,
his heires and successors, or to such officer, or officers, as shall be
appointed to Receive the same, the Sum of one Lamb, or two shillings
current mony of this province, upon the five & twentyth day of
March, at New York, in full of all rents, or former reserve rents,
services, acknowledgments and demands whatsoever.

* * * * * * *

In testimony whereof, I have caused the seale of he sd province
to be hereunto affixed, & these presents to be entered in the Secretary's
office, witnesse my hand, att Fortt James, the seven & twentyth day

of December, one thousand six hundred eighty-six, and in the second yeare of his majtis Reigne.

THOMAS DONGAN.

By Comand of his Exeye.

J. S. SWINTON.

May it Please your Excellecy, The Atturney Genll Hath perused This patent and Finds Nothing contained therein prejudicial to his Majty's Interest.

Exam. Xmber 24th, 1686.

SA. GRAHAM.

75 Att a counsill, held at Fort James, this 27th day of December, 1686.

prest. his Exeye, Majr. Anth. Brookholls, Majr. Fred Flipsen, Mr. John Spragge, Majr. Ger. Baxter.

This pattent was approved of.

J. S. SWINTON,
Cl. Coniss.

Recorded in the Secyes office for the Province of New York, In lib. No. 2, begun in No. 1686.

J. S. SWINTON, *Secr'y.*

Recorded in the Book of Entreyes, for the Trustees of the freeholders and comonalty of the towne of Brookhaven, begunn p. mo. Jan. 10th, 1686-7.

ANDREW GIBB, *Cl.*

Indian Deed from Ruben and other Indian proprietors to Trustees of Freeholders and Commonalty of the Town of Brookhaven, dated April 8, 1755, gives, grants, bargains, sells, aliens, conveys and confirms unto said Trustees, their successors forever.

All that Tract of Land covered with water, Situate and being in Said Brookhaven, contained between the South Beech and the firm Land, bounded Eastward by the mouth of Connecticut River and westward by the west Line of the Said Township of Brookhaven, with all and Singular the profits, advantages and previliges of Fishing, Fowling, Oystering and other previliges whatsoever thereunto belonging, or in any wise appertaining, And all their and every one of their Respective Rights, Title, Interest, claim, property and Demand whatsoever, of, and in the Same, To have, hold and Enjoy all the Said premises hereby Granted, and every
76 part thereof, with the appurtenances and hereditaments thereunto belonging unto the only Sole, proper use, Benefit and behoof of them, the Said Trustees of the Freeholders and Commonallitye of the Said Town of Brookhaven, and their Successors for Ever, free and Clear, of, and from all Incumbrances whatsoever.

Colonel William Smith's Patent, 1693.

William and Mary, by the Grace of God, King and Queen of England, Scotland, ffrance and Ireland, Defenders of the faith, &c., To all to whom these presents shall come, sendeth greeting:

Whereas, Benjamin Fletcher, our Capt. Generall and Governour-in-Chiefe of our Province of New York, and the territoryes depending thereon in America, hath, at the request of our loving subject, Colla. Willm. Smith, one of ye members of our councill and Chiefe-Justice of our said Province, hath issued his warrant to our Surveyor-Generall of our sd province, bearing date, the nineteenth day of September, for the surveying and laying out severall neckes and tracks of Land and meadow, beach, bay and Island within ye sd bay, scituate, lying and being upon the south syde of our island, formerly called Long Island, and now knowne and called by the name of our Island of Nassau, wch were formerly purchased of ye native Indians, according to the Lawes of our sd province, by virtue of a warrant fro. Collo. Slaughter, late Governour of our sd province, bearing date, the fourteenth day of May, in the year of our Lord, one thousand six hundred and ninety one. And whereas, Augustine Graham, our Surveyr Generall for our said Province of New York, &c., hath p'suant to his warrant aforesaid, surveyed and laid out the several neckes and tracts of land and meadow, beach, bay and Islands within the sd bay, upon the South side of our Island of Nassau: Bounded westward from the maine sea
77 or occian to the westermost bank of a river called East Connecticut, and soe along the banke of the sd river to a creeke running out of the sd river, called Yaphanke, and soe along the southwest bank of ye sd creek unto its head, the whole creek included, to a marked pine tree at ye head of ye sd creek, and soe in a direct north lyne until it comes to the bank of Connecticut River aforesd, to a marked tree on the west syde of sd river; and fro. thence alongst the westermost bank of sd river unto ye sd river head, ye whole river and all ye branches thereof included, and from thence alongst ye west syde of Connecticut Hollow to the country roade near ye middle of the island aforesd, to a markt tree there, the whole hollow included, and soe bounded northward by ye sd country road to another marked tree, being distant one fro ye other ffive miles and a halfe, and so in a direct south lyne from the eastermost marked tree near the country road aforesd, to a pyne tree marked with W. S. and three notches, at ye head of ye maine branch of Mastick River, and fro thence alongst ye eastermost bank of sd river, the whole river and all its branches included, to the maine sea; as also too small tracts of upland and meadow, lying east of the mastic river, called Puencatame and Hogges neck, and bounded easterward from ye maine sea to a river or creek, called Senekes River, and from thence in a direct north lyne to ye country road, and west by bounds aforesaid mentioned, and South by the sea; as also, one tract of beach, meadow and bay, lying along the South syde of the island aforesaid, with all the Islands in the sd

bay between the maine Island aforesd and the beach afore sd, from a certain Gutt or inlett westward, commonly called Huntington East Gutt, to a certain stake on the beach Eastward, to a place called Coptwange, being the town of Southampton westermost bounds; the sd beach and bay being from the East to the west bounds,
78 tweonty ffour miles and seven chaines, as by the returne of our sd surveyor, relation being thereunto had, may more fully and at large appear. And Whereas, our loving subject, the sd Coll. Willm. Smith, one of ye members of our Councill and Chiefe Justice of our sd Province of New Yorke and territorys depending thereon in America, hath not only been a great charge and expence in the purchasing of all the sd necks and tracks of land and meadow, beach, bay and islands upon the south syde of our sd island of Nassau, within ye limitts and bounds aforesaid, but also hath been at much more considerable charge and expence in ye purchasing and improvement of a certain neck or peninsula of upland and meadow and thatch beds on creek thatch, within the limitts and bounds of ye towne of Brookhaven, and lying and being situate on ye north syde of ye island of Nassau aforesaid, commonly called and known by ye name of ye little neck of Brookhaven aforesaid, being bounded southward by a lyne running along ye east syde of the sd Isthmues, and by ye gate of ye now highway, so running west along ye fence between ye said Smithe's Land and Justice Richard Whodhall's house Lott to a creek lying on the west syde of ye said Isthmus, and so bounded by ye bay, harbour and salt water round the neck aforesd, to ye marked tree by ye gate and highway aforesd; A also, one intire Island of thatch lying between the neck aforesd and the old field of ye towne aforesd, by ye sd Smith purchased from Samuell Eburne, Clark; as also a certaine part of a great thatch bedd lying alongst the Eastermost part of ye said neck, called the Indian Land, as also all such thatch beds or creek thatches as lyes with in the harbour in a direct lyne from ye marked tree, by the Gate, to ye southermost poynt of ye said Little Neck, called ffoyd's Poynt, given by the townesmen of Brookhaven to him, ye sd
79 Smith, as by their sd deeds relacon being thereunto had, may more fully appear. And whereas our sd loving subject hath, by his Petition, presented to the sd Benjamin ffletcher, our Captaine Generall and Governour-in-Chief of our sd Province of New Yorke and Territoryes depending thereon in America, and their Majtyes' Councill prayed our Grant and confirmacon of all and every of the saved several necks and tracts of land and meadow, beach, bay and islands within the respective limitts and bounds aforesd, and that wee would likewise erect all and every, the respective necks and tracts of land and meadow within the respective limitts and bounds aforesaid, into a Lordshipp or manor of St. George's, which reasonable request, for the future encouragement of our sd loving subject, wee being willing to grant; know yee that of our speciall Grace, certaine knowledge and meer motion, wee have given, granted, ratified and confirmed, and by these presents doe for us, our heirs and successors give, grant, ratify and confirm unto the sd Coll. Willm. Smith, his heires, and assigns all and every the forerecited necks,

tracts and parcells of Land and meadow within the respective limitts and bounds before menconed and expressed, together with all and every of the messuages, tenements, buildings, barnes, houses, out-houses, fences, orchards, Guardings, Pastures, meadows, marshes, swamps, pooles, poundes, waters, water courses, woods, underwoods, trees, timber, quarryes, Rivers, Runs, Rivoletts, Brooks, Lakes, Streames, Creeks, Harbours, beaches, bays inland fferyes, ffishing, ffowling, hunting, hawking, mines, mineralls (silver and Gold mines only excepted), and all the rights, members, Libertyes, priv-eiledges, Jurisdictions, Royaltyes, Hereditaments, proffits, benefits, advantages and appurtenances whatsoever, to the aforesd, severall and respective necks and tracts and parcells of Land and
80 meadow, Bay, Beach and Inlands with in the sd bay, belonging or in any ways appertaining, or accepted, reputed, taken, known or occupyed as part, parcell or member thereof; To Have and Hold all the afore-recited, severall and respective necks, tracts and parcells of Land and meadow and premises within the respective limitts and bounds aforesd, wth all and every of their appurtenances unto him, the sd Coll. Willm. Smith, his heirs and assigns, to the only proper use, benefit and behoofe of him, the sd William Smith, his heirs and assigns forever, moreover Know ye that of our further Speciall Grace, certaine knowledge and meer mocon, wee have thought fit, according to ye request of our sd loving subject, to erect all the afore-recited necks, tracts and parcells of Land and meadow, beach, bay and Islands wth in ye limits and bounds afore sd, into a lordshipp and mannor; and therefore, by these presents, wee doe, for us, our heirs and successors, erect, make and constitute all ye aforesd recited necks, tracts and parcells of Land and meadow, beach, bay and inlands within the limits and bounds afore menconed together, wthall and every the above granted premises, wth all, and every of their appurtenances into one Lordship and mannour to all intents and purposes, and it is our Royall Will and pleasure that the sd Lordshipp and mannour shall, from henceforth, be called the Lordshipp and mannour of St. George's, and know yee that wee, reposing especiall trust and confidence in the loyalty and wisdome, Justice, pruedence and circumspection of our sd loving subject doe, for us, our heirs and successors, give and grant unto the sd Coll. Willm. Smith, and to heirs and assigns of him, the said Coll. William Smith, full power and authority, at all tymes, forever hereafter, in the sd lordshipp and mannour, one court Leet and Court Baron, to hold and keep at such tyme and tymes, and soe often, yearly, as he or they shall see meet, and all fines, issues and amerce-
81 ments at the sd Court Leet and Court Baron to be holden wth in the sd Lordshipp or mannor to be sett, forfeited, or imployed, or payable, or happening, at any time, to be payable by any of the Inhabitants of, or within the sd Lordshipp or mannour of St. George's, or the Limitts and bound thereof, and also, all and every of the power and authority hereinbefore menconed for the holding and keeping of the sd Court Leet and court baron from tyme to tyme, and to award and issue out the accustomary writts to be issued and awarded out of the sd Court Leet and Court Baron

to be kept by the heirs and assigns of the sd Coll. Willm. Smith forever, or their or any of their Stewards deputed and appoynted, with full and ample power and authority, to distraine for the rents, services, and other summs of money payable by virtue of the premises, and all other lawfull remedyes and means for the having, possessing, levying and enjoyning the premises and every part and parcell of the same, and all waifes, estrays, deomands, good of ffellows happening and being forfeited within the said Lordshipp or mannor of St. George's, and all and every sum and summes, and summes of money, to be payd as a post fine upon any fine or fines to be levyed of any lands, tenements or hereditaments within the sd Lordshipp or mannor of St. George's, and wee doe also further give and grant unto the sd Coll. Willm. Smith, his heirs and assigns that all and singular, the tenants of him, the sd Coll. Willm Smith within the said mannor shall, and may at all tymes, hereafter meet together and choose assessors within the mannour aforesaid, according to the true rules, wayes and methods as are prescribed for cittyes, townes and countyes within our said Province, &c., by the acts of Generall Assembly for the defraying the publick charge of
82 each respective citty, towne & county aforesaid, and all such summes of money soe assessed and levyed to collect and dispose off for such uses as the sd acts of Generall Assembly shall establish and appoynt, To Have, and to Hold, possess and enjoy, all & singular, the sd Lordshipp or mannour of St. George's and premisses, with all their and every of their appurtenances unto the sd Coll. Willm Smith, his heirs and assigns to the only proper use, benefit and behoofe of him, the sd Coll. Wilm Smith, his heires and assigns forever, and that the sd Lordship and mannour aforesaid shall be and forever continue free and exempt from the Jurisdiction of any towne, towneship or mannor whatsoever to be holden of us, our heirs and successors in free and common soccage, according to the tennour of our mannor of East Greenwich in the county of Kent, in our Kingdom of England, yielding, rendering therefore yearly, and every year forever, unto their most sacred Majesties aforesaid, their heirs and successors, or to such officer or officers as shall, from tyme to tyme, be empowered to receive the same, if demanded, twenty shillings, currant money of this Province, upon the tenth day of October, in lieu and stead of all services, dutyes or demands whatsoever.

Witness, Benjamin ffletcher, our Captaine Generall and Governour in Chief of our Province of New York and the territoyes depending thereon in America. Given at ffort Willm Henry, in our citty of New York, this ninth day of October, in the fifth year of our reigne, 1693.

STATE OF NEW YORK,
Secretary's Office, ss:

I have compared the preceeding with the Record of a Patent to William Smith, as found in Book of Patents, No. 6, page 421, &c., and do certify that it is a correct transcript therefrom and of the whole of said Record.

83 In testimony whereof I have hereunto set my hand and affixed my official seal, at the City of Albany, this twenty-fifth day of March, in the year of our Lord one thousand eight hundred and fifty-seven.

N. P. STANTON,
Dep. Sec. of State.

Last Will and Testament of Col. William Smith, the above-named Patentee, dated April 23, 1704, and duly proved, admitted to probate and recorded in the Surrogate's Court of the City and County of New York.

Under the provisions of this Will, all the right, title and interest which the said Col. William Smith acquired in the Great South Bay and in the fishery rights therein, passed to his son, William Smith.

Last Will and Testament of William Smith, legatee above named, dated January 17th, 1742, and duly proved, admitted to probate and recorded in the Surrogate's Court of the City and County of New York.

Under the provisions of this Will, all the right, title and interest which the testator had in the Great South Bay and in the fishery rights therein, passed to his son, William Smith.

Deed from William Smith, the last named legatee, to Nathaniel Brewster and others, Trustees of the Freeholders and Commonalty of the Town of Bookhaven, dated March 3, 1767, and in consideration of five pounds current lawful money of New York, gives, grants, bargains, sells, aliens, conveys and confirms unto the said Trustees, their heirs and successors forever: "all my Estate, Right, title and Intrast, Property, Claim and demand, which I, the said William Smith, Now have to all that part of South Bay or
84 lands covered with water and the Island in the said Bay, sittuate, lying and being between a North line from Huntington East Gut and a South line from Richard Woodhull's Point of Meadow, on the west side of the mouth of East Connecticut or Sebonnack River, on the South side of Nassau Island, in the county of Suffolk, To have and to hold the above Granted and Bargained premises, With all and Singular, the appurtenances, privileges and commodities to the same Belonging, or, in any wise appertaining to them, the said Trustees, their Heirs and successors forever, to them and their only proper Use, Benefit and behoof forever."

Deed from Nathaniel Brewster and others, the Trustees of the Freeholders and Commonalty of the Town of Brookhaven to William Smith, the grantor in the last deed, dated March 4, 1767, and in consideration of five pounds current, lawful money of New York, gives, grants, bargains, sells, aliens, conveys and confirms unto the said William Smith, his heirs and assigns forever, "all our estate, right, title, interest, property, claim and demand, which we, the said Trustees, now have of, in and to one equal half part of that part of the South Bay or land covered with water, and one equal half of the Islands in the said Bay, situate, lying and being between

a North line from Huntington East Gut and a South line from Richard Woodhull's point of meadow on the west side of the mouth of East Connecticut or Seboinack River, on the South side of Nassau Island, in the County of Suffolk aforesaid, To have and to hold the above granted and bargained premises, with all and singular, the appurtenances, privileges and commodities to the same belonging or in any wise appertaining to him, the said William Smith, his heirs and assigns forever, to his and their only proper use, benefit and behoof forever."

85 Last Will and Testament of William Smith, the last named grantee, dated May 6, 1796, proved, admitted to probate and recorded in the Surrogate's Court of Suffolk County.

Under the provisions of this Will, all the right, title and interest which said testator had in the Great South Bay and in the fishing rights therein, passed to his son, William Smith.

Last Will and Testament of William Smith, the last named legatee, dated October 18, 1801, proved, admitted to probate and recorded in the Surrogate's Court of Suffolk County.

Under this will, all the right, title and interest which said testator, William Smith, had in the Great South Bay, and in the fishing rights therein, passed to his son, William Sidney Smith.

Last Will and Testament of William Sidney Smith, the last named legatee, dated February 4, 1869, proved, admitted to probate and recorded in the Surrogate's Court of Suffolk County.

Under this will, all the right, title and interest which said testator, William Sidney Smith, had in the Great South Bay, and the fishing rights therein, passed to his son, Robert R. Smith.

Robert R. Smith, the last named legatee, died intestate at the Town of Brookhaven, Suffolk County, New York, on the 26th day of October, 1885, still owning and possessing the interests in the Great South Bay and the fishing rights therein, which had been devised to him by his father, and leaving him surviving, Cornelia T. Smith, his widow, and Helen T. Smith and William Sidney Smith, his only children and heirs at law, both of whom were then under the age of twenty-one years.

Letters of Guardianship of the persons and estates of the said Helen T. Smith and William Sidney Smith were duly issued by the Surrogate's Court of Suffolk County, on November 19th, 1885, to Cornelia T. Smith and Thomas S. Strong, who duly qualified and acted as such guardians.

86 Judgment made and entered June 15th, 1892, in an action in the Supreme Court of the State of New York, Suffolk County, wherein Cornelia T. Smith and Thomas S. Strong, as Guardians of William Sidney Smith and Helen T. Smith, Infants, and the said Cornelia T. Smith, Individually, were plaintiffs, and the Trustees of the Freeholders and Commonalty of the Town of Brookhaven, were defendants.

At a Special Term of the Supreme Court of the State of New York, held at the Kings County Court House, in the City of Brooklyn, on the 15th day of June, 1892.

Present: Hon. Edgar M. Cullen, Justice.

CORNELIA T. SMITH and THOMAS S. STRONG, General Guardians of William Sidney Smith and Helen T. Smith, Infants, and the said Cornelia T. Smith, Individually, Plaintiffs,

against

THE TRUSTEES OF THE FREEHOLDERS AND COMMONALTY OF THE TOWN OF BROOKHAVEN, Defendant.

The above-entitled action having been brought to trial at a Special Term of this Court, held at the Court House at Riverhead, in Suffolk County, in October, 1890, before Hon. Edgar M. Cullen, Jus-
87 tice, without a jury, and said Justice after due deliberation having made and signed his Findings of Fact and Conclusions of Law, separately, whereby it appears that on the 26th day of October, 1885, Robert R. Smith died at Yaphank, in Suffolk County, intestate, and being an inhabitant of said County and Town of Brookhaven, and having been during all his life one of the freeholders and commonalty of said Town of Brookhaven, that said Robert R. Smith left him surviving the plaintiff, Cornelia T. Smith, his widow, and two minor children, William Sidney Smith and Helen T. Smith, his only heirs at law; that Cornelia T. Smith and Thomas S. Strong have been duly appointed Guardians of the persons and estates of said Infants, and are now such Guardians; that the defendant is a body corporate, duly incorporated and existing; that said Robert R. Smith at the time of his death was the owner and was seized in fee simple and possessed of one undivided half part of the property, rights and privileges in said findings and hereinafter described; that at the same time the defendant corporation was the owner and was seized in fee simple and possessed of one other undivided half part of the said property, rights and privileges; that the said Smiths and said defendant corporation were tenants in common of said property, rights and privileges; that on the death of said Smith his said children became seized in fee simple and possessed of the said one undivided half part of said premises, rights and privileges, which belonged to their said father, as tenants in common with said defendant corporation, subject however, to the dower right of their mother, the plaintiff, Cornelia T. Smith, therein; that upon the death of said Robert R. Smith, his said widow became entitled to a dower right in the share which descended to his children; that at

the time of the commencement of this action the said William Sidney Smith and Helen T. Smith were and now are tenants in com-
88 mon with said defendant corporation, of the aforesaid premises, rights and privileges, the said Smiths and said defendant corporation being severally entitled to an undivided half part thereof; that on or about March 3, 1767, the agreement set forth in the complaint between William T. Smith and the defendant was duly made and entered into as therein averred; that the infants, William Sidney, and Helen T. Smith, have succeeded to and are now seized of and entitled to the premises, rights, privileges and profits designated or referred to in said agreement; that during the life of said William Smith the use and enjoyment of said premises was under and in conformity with said agreement, and that the defendant has continued the same use and enjoyment, with the acquiescence of its successive co-tenants, and has from time to time accounted to, and with its co-tenants in succession, respectively, accordingly, from and after the death of said William Smith, to the present time, that during said period the defendant corporation has assumed and exercised the management of said common property, recognizing, nevertheless, the title, rights and interests of its co-tenant and co-tenants for the time being, that during the same time the defendant corporation has annually rendered accounts to its co-tenant or co-tenants for the time being, and paid over the share of the profits shown by these accounts to belong to the co-tenant, that in the management hereinbefore referred to, the defendant corporation has acted in respect to one undivided half of said common property as owner, and in respect to the other undivided half, as Trustee for its co-tenant or co-tenants respectively, and has assumed the performance of the duties of such Trustee, that the accounts rendered by said defendant corporation to its co-tenants during the six years next preceding the commencement of this action, are not correct,
89 and not conformable to the duties imposed by the Trust aforesaid, that it has charged against its co-tenants expenses not properly chargeable against them; that in many instances it has accepted inadequate rents for oyster lands, that after scattering oyster seed in the Bay, it has permitted fishermen to take it and oyster spawn without requiring any compensation therefor, that it has made improvident leases of considerable portions of the Bay for planting oysters, that in making these leases it has assumed to act for itself and as Trustee for the Infant plaintiffs; that in the management of the common property it executed leases of certain portions thereof, and in such leases assumed to lease the whole of the several tracts covered by said leases; that the plaintiffs are entitled to one-half of all the rents received by it, from all the leases made by it, in excess of proper charges; that they are entitled to one-half of all the rents and revenues received, or which by reasonable diligence might have been obtained by said defendant corporation from said common property, under the agreement of partnership and the course of dealing thereunder; that the plaintiffs and defendant are seriously at variance respecting the management of said common property; that the plaintiffs have demanded of the defendant corporation proper accounts of its management of the common property;

that said defendant has refused and neglected to give such accounts; that the plaintiffs have demanded of the defendant corporation an equal participation with it in the management of the common property, which demand said defendant has refused, insisting that the said agreement of March 3, 1767, has been continued in force by the mutual acts and acquiescence of the parties in interest, and which demand said defendant has refused until the rights of the respective parties should be determined, and refused to admit said plain-
90 tiffs to such participation in the management of said property until the legal status of the respective parties was determined by the Court, and continued meantime to manage said property and make such payments as before until the time of the trial of this action; that said plaintiffs have forbidden the defendant corporation leasing any portion of the common property without consulting the plaintiffs and agreeing with them respecting the same; that notwithstanding said prohibition said defendant corporation has continued to lease portions of the common property, without consulting with or obtaining the consent of the plaintiffs, that the successive co-tenants of said defendant corporation in said common property have been freeholders and of the commonalty of said town of Brookhaven, and the rights and interests which descended to said infants from their father, Robert R. Smith, consist very largely of real estate lying in said town.

And whereby said Justice finds Conclusions of Law which entitle the plaintiffs to the following judgment:

Now therefore on motion of Asa A. Spear, plaintiff's attorney, it is ordered, adjudged and decreed, That the plaintiffs, William Sidney Smith and Helen T. Smith, together, and the defendant corporation are tenants in common of the premises, being the property, lands, waters, fisheries and of all the rights, privileges and profits set forth in the complaint, to wit: All that part of the Great South Bay or lands covered with water and the islands in said Bay, situate, lying and being between a line formerly known as a North line from Huntington East Gut, but now known as "The Ranges" (being the line as settled by Commissioners of the Towns of Brookhaven, Hunt-
ington and Islip) and a line running South from Long Point,
91 formerly known as a South line from Richard Woodhull's Point of Meadow, on the West side of the mouth of Connecticut or Sebonnack River, on the South side of Nassau or Long Island, in the County of Suffolk, said lands being bounded Northerly by the South shore of Nassau or Long Island, East by said line from Long Point, South by the Great South Beach, and Westerly by the said Ranges, with all and every the beaches, bays, islands, fishing, fowling, hunting, hawking and all the rights, members, liberties, privileges, jurisdictions, royalties, hereditaments, profits and appurtenances whatsoever thereunto belonging or in any way appertaining; that they are seized and possessed of the bed of the Bay, the water and islands therein, and that they are the exclusive owners of the fishery therein, embracing shell fish, crabs, mussels and floating fish, and of all wild fowl and birds and game within the premises

aforesaid, the said Smiths and the said corporation owning each an undivided equal half part thereof.

And it is further ordered, adjudged and decreed, that the said plaintiffs and the defendant corporation, as such tenants in common, are entitled equally to hold, manage and possess the common property, and all the rights, privileges and advantages appertaining thereto, and that the said co-tenants are each entitled to an equal use of the property held in common by them.

* * * * * * *

Enter,

E. M. C.

Granted, signed and settled as above June 15, 1892.
Read papers herein recited.
Enter in Suffolk County,

JOHN COTTIER, *Clk.*

92 Referee's report in an action in partition in the Supreme Court of the State of New York, County of Suffolk, wherein Helen T. Smith and William Sidney Smith, infants, by Cornelia T. Smith their Guardian ad Litem, were plaintiffs, and The Trustees of the Freeholders and Commonalty of the Town of Brookhaven, and said Cornelia T. Smith, were defendants, dated January 13, 1900.

Supreme Court, Suffolk County.

HELEN T. SMITH and WILLIAM SIDNEY SMITH, Infants, by CORNELIA T. SMITH, their Guardian ad Litem, Plaintiffs,
against
THE TRUSTEES OF THE FREEHOLDERS AND COMMONALTY OF THE Town of Brookhaven and Cornelia T. Smith, Defendants.

To the Supreme Court of the State of New York:

Pursuant to an order of this Court made and entered in the above-entitled action on the 16th day of December, 1899, referring it to me to take proof of the plaintiffs' title and interest in the premises and property rights described in the complaint, and of the several matters set forth in the complaint, and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances by which the same are
93 held, and to ascertain and report whether the shares of the plaintiffs are so situated that they may be set off to them in common without injury to the interests of the other parties, and to report with my opinion thereon to the end that such further order may be made in the premises as shall be just and proper, I, the undersigned, as referee, do respectfully report:

That I first took the oath prescribed by law which is hereunto annexed; that I issued a Summons to the Attorneys of all parties in interest requiring them to attend a hearing of this matter before me at my office at Patchogue, Suffolk County, New York, on the 28th

day of December, 1899, at eleven o'clock in the forenoon, which Summons was returned to me with due proof of the service thereof upon the Attorneys for all the parties to this action, which Summons, with the admission of service endorsed thereon is hereunto annexed; that upon said 28th day of December, 1899, I was attended by Asa A. Spear, Esq., of Counsel for the plaintiffs, and by George H. Furman, Esq., of Counsel for the defendant, the Trustees of the Freeholders and Commonalty of the Town of Brookhaven, the Counsel for the defendant, Cornelia T. Smith, failing to appear, though she appeared in person and was present through the hearing; I thereupon proceeded to hear the allegations and to take the evidence of the parties, all of which, except such as is documentary is hereunto annexed.

From the evidence so submitted to me I do find as

Matters of Fact.

First. That the plaintiff, Helen T. Smtih, is an Infant of the age of nineteen years and upwards; and the plaintiff, William Sidney Smith, is an Infant of the age of sixteen years and upwards.

94 Second. That by an order of this Court bearing date the 11th day of October, 1899, Cornelia T. Smith, the mother of said Infants, was duly appointed their Guardian ad Litem for the purpose of bringing this action upon her filing a bond according to law to each of said Infants in the penalty of five hundred dollars, and that on the 17th day of October, 1899, she duly filed the bonds required by said order, duly approved by one of the Justices of this Court, in the Office of the Clerk of Suffolk County.

Third. That by an order bearing date the 9th day of October, 1899, and duly filed in his office, the Surrogate of the County of Suffolk (that being the County where the property affected by this action is situated) gave his written authority for the bringing of this action.

Fourth. That the defendant, The Trustees of the Freeholders and Commonalty of the Town of Brookhaven, is a body corporate, capable of suing and being sued, duly incorporated and existing under and by virtue of two Certain Colonial Charters or Letters Patent, one granted by Richard Nichols, then Governor General under James, Duke of York, of all his Territories in America, bearing date the 17th day of March, 1666; the other by Thomas Dongan, then Governor of the Province of New York, under James the Second, King of England, and dated the 27th day of December, 1686, which said Charters or Letters Patent have been duly acknowledged, ratified and confirmed by the Constitution and Laws of the State of New York.

Fifth. That on or about the 26th day of October, 1885, Robert R. Smith, the father of the plaintiffs, died intestate, at Yaphank, in the County of Suffolk and State of New York, where he re-

95 sided, seized in fee simple as tenant in common with the defendant, The Trustees of the Freeholders and Commonalty of the Town of Brookhaven, and possessed of All that part of the Great

South Bay and lands covered with water and the islands and bogs in said Bay, situate in the Town of Brookhaven, County of Suffolk and State of New York, between a line formerly known as a North and South line from Huntington East Gut, but now known as "The Ranges," extending from the South shore of Long Island to the Great South Beach (being the line as settled by Commissioners of the Towns of Huntington, Brookhaven and Islip), and a line running South from Long Point to the Great South Beach, formerly known as a South line from Richard Woodhull's Point of Meadow, on the West side of Connecticut or Sebonnack River on the South side of Nassau or Long Island in the County of Suffolk, said lands being bounded Northerly by the South shore of Nassau or Long Island, Easterly by said line from Long Point to the Great South Beach, Southerly by the Great South Beach and Westerly by The Ranges; with all and singular the beaches, coves, bays, inlets, islands, bogs, fishing, fowling, hunting, hawking, and all the rights members, liberties, privileges, jurisdictions, royalties, hereditaments, profits and appurtenances thereunto belonging or in any way appertaining, including the bed of the Great South Bay and of its inlets, coves and bays, and the waters, islands and bogs in said Bay, and the fishing and gunning therein, embracing shell fish, crabs, mussels and floating fish and the wild fowl, birds and game within said boundaries.

Sixth. That said Robert R. Smith left him surviving the said plaintiffs, Helen T. Smith and William Sidney Smith, his only children and heirs at law, and the defendant, Cornelia T. Smith, his widow.

96 Seventh. That upon the death of said Robert R. Smith, the said plaintiffs, Helen T. Smith and William Sidney Smith, became seized in fee simple as tenants in common with the said defendants, The Trustees of the Freeholders and Commonalty of the Town of Brookhaven, and possessed of the above described lands, lands under water, islands, bays, coves, bogs, inlets, hunting, hawking, fowling and fishing rights subject to the dower right therein of their said mother, the defendant, Cornelia T. Smith.

Eighth. That the said dower right of the said defendant, Cornelia T. Smith, has never been assigned.

Ninth. That the rights and interests of the several parties to this action in the property above described are as follows:

The plaintiff, Helen T. Smith, is seized in fee simple and possessed of one undivided fourth part thereof, subject to the dower right therein of the defendant, Cornelia T. Smith.

The plaintiff, William Sidney Smith, is seized in fee simple and possessed of one other undivided fourth part thereof, subject to the dower right therein of the defendant, Cornelia T. Smith.

The defendant, The Trustees of the Freeholders and Commonalty of the Town of Brookhaven, is seized in fee simple and possessed of one undivided half part thereof.

The defendant, Cornelia T. Smith, is entitled to a dower right in the undivided shares of her said children, Helen T. Smith and William Sidney Smith.

97 Tenth. That the above described property and rights comprise the only real estate and chattels real within this State owned in common by all the parties to this action.

Eleventh. That there are no specific liens or incumbrances upon the premises hereinbefore described or any of them, except certain unrecorded leases of portions of said Bay for oyster raising, dock and gunning privileges, which in case of actual partition, will attach to the share of the party receiving the portion of the Bay covered by them.

Twelfth. All the parties to the action desire the actual partition of the common property.

Thirteenth. I find no reason why the common property may not be actually partitioned.

Fourteenth. Disagreements have arisen between the tenants in common as to the management of the common property, which in my judgment, require its partition. The interests of the infant plaintiffs will be materially injured unless partition can be soon effected.

Fifteenth. The following is an abstract of the conveyances and instruments by which the premises and property rights described in the complaint are held:

In his lifetime, William Sidney Smith, the grandfather of the plaintiffs, held an undivided half part thereof under a patent from the English Crown and certain Wills of his ancestors and partition deeds between one of them and The Town of Brookhaven. During his lifetime he and the said Town managed and controlled said common property in common and divided the income therefrom between them. Upon his death he left the following Will:

98 Last Will and Testament of William Sidney Smith. Dated February 4th, 1869, Proved Before Surrogate of Suffolk County on the 18th Day of March, 1897.

By this Will he devises all his interests in the common property to his son, Robert R. Smith.

Robert R. Smith died intestate October 26th, 1885, and his interest in the common property descended to his children, Helen T. Smith and William Sidney Smith, subject to the dower of their mother, Cornelia T. Smith.

The town derives its title through a patent from Richard Nichols, Governor General under James, Duke of York, of all his territories in America, dated March 17th, 1666, and a patent from Thomas Dongan, Governor of the Province of New York, under James the Second, King of England, dated December 17th, 1686.

Sixteenth. It is the desire of the plaintiffs and of their mother, the defendant, Cornelia T. Smith that their shares and interests be set off to them without partition as between themselves, to be held by them in common, as provided by Section 1548 of the Code of Civil Procedure. I have taken testimony upon this subject and find no reason why this may not be done. The property is a very large tract of about 48,000 acres of land, for the most part under water, extending in a continuous line along the south shore of Long Island about fourteen miles, together with the said waters and the

hunting, fishing and other rights pertaining to the same; the shore lines are continuous; the general character of the bottom is the same; the lands under water are adapted to oyster raising.

99 My opinoin is that the plaintiffs' shares may be set off to them in common, as they desire, without injury to the interests of the other owner.

All of which is respectfully submitted.

Dated Patchogue, January 13th, 1900.

ROBERT S. PELLETREAU, *Referee.*

Interlocutory Judgment in the Same Action, Made and Entered February 5th, 1900.

At a Special Term of the Supreme Court of the State of New York, Held at the Kings County Court House in the Borough of Brooklyn, on the 5th Day of February, 1900.

Present—Hon. William D. Dickey, Justice.

HELEN T. SMITH and WILLIAM SYDNEY SMITH, Infants, by CORNELIA T. SMITH, Their Guardian ad Litem, Plaintiffs,
against
THE TRUSTEES OF THE FREEHOLDERS AND COMMONALTY OF THE TOWN OF BROOKHAVEN and CORNELIA T. SMITH, Defendants.

Interlocutory Judgment, February 8, 1900.

The referee appointed herein by an order of this Court, dated December 16th, 1899, having made his report which bears

100 date January 13th, 1900, and which report was duly filed in the office of the Clerk of Suffolk County on the 23rd day of January, 1900, whereby it appears that the plaintiff, Helen T. Smith, is an infant of the age of nineteen years and upwards, and the plaintiff, William Sydney Smith, is an infant of the age of sixteen years and upwards, that by an order of this Court bearing date the 11th day of October, 1899, Cornelia T. Smith, the mother of said infants, was duly appointed their Guardian ad Litem for the purpose of bringing this action upon her filing a bond according to law to each of said infants in the penalty of five hundred dollars, and that on the 17th day of October, 1899, she duly filed the bonds required by said order, duly approved by one of the Justices of this Court, in the office of the Clerk of Suffolk County; that by an order bearing date the 9th day of October, 1899, and duly filed in his office, the Surrogate of the County of Suffolk gave his written authority for the bringing of this action, that the defendant, The Trustees of the Freeholders and Commonalty of the Town of Brookhaven, is a body corporate, duly incorporated and existing, capable of suing and being sued; that the plaintiffs, Helen T. Smith and William Sidney Smith, are seized in fee simple as tenants in common with the defendant, The Trustees of the Freeholders and

Commonalty of the Town of Brookhaven, and possessed of the lands, lands under water, islands, bays, coves, bogs, inlets, hunting, hawking, fowling and fishing rights in said report and hereinafter described, subject to the dower right therein of their mother, the defendant Cornelia T. Smith, which dower right has never been assigned; that the rights and interests of the several parties to this action in the said premises and property are as hereinafter decreed; that there are no specific liens or incumbrances upon the said premises and property, except certain unrecorded leases of portions
101 of said bay for oyster raising, dock and gunning privileges, which in case of actual partition will attach to the share of the party receiving the portion of the premises covered by them; that all the parties to the action desire the actual partition of the common property, and that the same is so circumstanced that a partition thereof can be made without prejudice to the owners thereof; that the plaintiffs and their mother, the defendant Cornelia T. Smith, desire that their shares and interests be set off to them without partition as between themselves, to be held by them in common as provided by Section 1548 of the Code of Civil Procedure, and that, in the opinion of said Referee, such shares may be set off to them in common as they desire, without injury to the interests of the other owner, and that such partition would be more advantageous to the owners than a sale.

Now, on reading and filing said Reports, and on due proof of service of notice of this motion on all parties entitled thereto, and on motion of Strong & Spear, Attorneys for the plaintiffs, and after hearing Asa A. Spear, Esq., of Counsel for the plaintiffs, for this motion, and George H. Furman, Esq., of Counsel for the defendant The Trustees of the Freeholders and Commonalty of the town of Brookhaven, for said Trustees, and due deliberation having been had,

It is ordered, adjudged and decreed, That the said report of said Referee, be, and the same hereby is in all things approved, ratified and confirmed.

And it is further ordered, adjudged and decreed, That the rights, titles and interests of the several parties to this action in the aforesaid common property are as follows, to wit:

The Plaintiff, Helen T. Smith, is seized in fee simple and possessed of one undivided fourth part thereof, subject to the dower right therein of the defendant, Cornelia T. Smith.

102 The Plaintiff, William Sidney Smith, is seized in fee simple and possessed of one other undivided fourth part thereof, subject to the dower right therein of the said defendant, Cornelia T. Smith.

The Defendant, The Trustees of the Freeholders and Commonalty of the Town of Brookhaven, is seized in fee simple and possessed of one undivided half part thereof.

The Defendant, Cornelia T. Smith, is entitled to a dower right in the undivided shares of her said children, Helen T. Smith and William Sidney Smith, which has never been assigned.

And it is further ordered, adjudged and decreed, That actual

partition be made between the said parties according to the rights and interests of the parties respectively as above declared, and that the shares and interests of the plaintiffs and their mother, the defendant, Cornelia T. Smith, be set off to them without partition as between themselves to be held by them in common as provided by Section 1548 of the Code of Civil Procedure.

And it is further ordered, adjudged and decreed, That the common property and rights to be partitioned are described as follows: All that part of the Great South Bay and lands covered with water and the islands and bogs in said bay, situate in the Town of Brookhaven, County of Suffolk and State of New York, between a line formerly known as a North and South line from Huntington East Gut, but now known as "The Ranges," extending from the South shore of Long Island to the Great South Beach (being the line as settled by the Commissioners of the Towns of Huntington, Brookhaven and Islip) and a line running South from Long Point to the Great South Beach, formerly known as a South line from Richard Woodhull's Point of Meadow on the West side of
103 Connecticut or Sebonnack River on the South side of Nassau or Long Island in the County of Suffolk, said lands being bounded Northerly by the South shore of Nassau or Long Island, Easterly by said line from Long Point to the Great South Beach, Southerly by the Great South Beach and Westerly by the Ranges, with all and singular the beaches, coves, bays, inlets, islands, bogs, fishing, fowling, hunting, hawking, and all the rights, members, liberties, privileges, jurisdictions, royalties, hereditaments, profits and appurtenances thereunto belonging or in any way appertaining, including the bed of the Great South Bay and of its inlets, coves and bays, and the waters, islands and bogs in said bay, and the fishing and gunning therein, embracing shell fish, crabs, mussels and floating fish and the wild fowl, birds and game within said boundaries.

And it is further ordered, adjudged and decreed, That Thomas Young, Esq., of Huntington, in the County of Suffolk, Solomon Ketcham of the Town of Babylon in said County and Jonathan B. Terry of the Town of Southold in said County, three reputable and disinterested freeholders, be and they are hereby appointed Commissioners, to make the partition hereinbefore adjudged, according to the respective rights and interests of the parties as the same are herein ascertained and determined by the Court.

And it is further ordered, adjudged and decreed, That each of said Commissioners must before entering upon the execution of his duties, subscribe, take and file an oath as required by law, and that in making partition, the said Commissioners shall divide the said premises and rights into two equal parts, quantity and quality being relatively considered, according to the respective rights and
104 interests of the parties as fixed by this interlocutory judgment, and that they allot to the plaintiffs and the defendant, Cornelia T. Smith, one of said equal parts to be held by them in common as provided by Section 1548 of the Code of Civil Procedure and that they allot one of said equal parts to the defendant, The Trustees of the Freeholders and Commonalty of the Town of Brook-

haven, to be held and enjoyed by said defendant in severalty according to its rights, shares and interests as ascertained, determined and declared herein, and they shall designate the several parcels by posts, stones or other permanent monuments.

And it is further ordered, adjudged and decreed, That each party to this action be and hereby is required to produce and leave with said Commissioners or a majority of them for such time as they shall deem reasonable, all deeds, writings, surveys or maps relating to the said premises or any part thereof.

And it is further ordered, adjudged and decreed, that all questions of costs and allowances be reserved until the settlement of the final judgment herein, and that any of the parties to this action shall be at liberty to apply to this Court at the foot of this judgment for further direction in the premises.

Enter in Suffolk County.

Enter,

WILLIAM D. DICKEY, *J. S. C.*

Granted Feb. 5, 1900.

PETER P. HUBERTY, *Clerk.*

105 *Report of Commissioners in Partition in Same Action, Dated August* 20, 1900.

New York Supreme Court, Suffolk County.

HELEN T. SMITH and WILLIAM SIDNEY SMITH, Infants, by CORNELIA T. SMITH, Their Guardian ad Litem, Plaintiffs,
against
THE TRUSTEES OF THE FREEHOLDERS AND COMMONALTY OF THE TOWN OF BROOKHAVEN and CORNELIA T. SMITH, Defendants.

To the Supreme Court:

The undersigned appointed commissioners in partition by an interlocutory judgment of this Court dated the fifth day of February, 1900, do respectfully report:

That having first taken the oath prescribed by law we have carefully examined the premises which are described in the said judgment as follows: All that part of the Great South Bay and lands covered with water and the islands and bogs in said Bay, situate in the Town of Brookhaven, County of Suffolk and State of New York, between a line formerly known as a North and South line from Huntington East Gut, but now known as "The Ranges," extending from the South shore of Long Island to the Great South Beach,
(being the line as settled by the Commissioners of the Towns
106 of Huntington, Brookhaven and Islip) and a line running
South from Long Point to the Great South Beach, formerly known as a South line from Richard Woodhull's Point of Meadow on the West side of Connecticut or Sebonnack River on the South side of Nassau or Long Island in the County of Suffolk, said lands being bounded Northerly by the South shore of Nassau or Long Island, Easterly by the said line from Long Point to the Great

South Beach, Southerly by the Great South Beach and Westerly by the Ranges, with all and singular the beaches, coves, bays, inlets, islands, bogs, fishing, fowling, hunting, hawking, and all the rights, members, liberties, privileges, jurisdictions, royalties, hereditaments, profits and appurtenances thereunto belonging or in any way appertaining, including the Bed of the Great South Bay and of its inlets, coves and bays, and the waters, islands and bogs in said Bay, and the fishing and gunning therein, embracing shell fish, crabs, mussels and floating fish and the wild fowl, birds and game within said boundaries, and have made partition thereof as directed by said judgment as follows:

We have divided said premises and appurtenances into two equal parts, quality and quantity relatively considered, by a straight line Beginning at a granite monument (upon one side of which is engraved the letter "B," and on the opposite side the letter "S") set in the beach and meadow a few feet above ordinary high water mark on the North shore of said Great South Bay near Hawkins Point (so called on the Map filed herewith) and at a point due South from the apex of the tower of the Firemen's Truck House in the village of Bayport, L. I., and running thence due South across said Bay to the said Great South Beach and to another granite monument (marked with the letters "B" and "S" in like manner as said first mentioned monument) set upon the bluff or high
107 ground a few feet to the South of the line of ordinary high water mark upon the South Shore of said Great South Bay.

That we have set off and allotted and do hereby set off and allot to the plaintiffs, Helen T. Smith and William Sidney Smith, to be held by them in common, all that part of said premises with the appurtenances pertaining thereto, which lies West of said line crossing the Great South Bay and containing (as shown by the Map filed herewith) thirteen thousand three hundred and ninety-seven and one half acres, subject however to the dower right therein of the defendant, Cornelia T. Smith, which dower right has never been assigned.

That we have set off and allotted and do hereby set off and allot to the defendants herein the Trustees of the Freeholders and Commonalty of the Town of Brookhaven, all that part of said premises with the appurtenances pertaining thereto which lies East of said line crossing the Great South Bay and containing (as shown by the Map filed herewith) seventeen thousand nine hundred and forty seven and one half acres.

That said premises so set off as aforesaid are also designated on the Map which was read in evidence on one of the hearings before us and said Map has the title of this suit and our names as commissioners herein written thereupon for its identification, and said Map is filed with this report as a part thereof.

In Witness Whereof we, the said Commissioners have hereunto set our hands and seals this 20th day of August, 1900.

THOS. YOUNG, [L. S.]
SOLOMON KETCHAM, [L. S.]
JONATHAN B. TERRY, [L. S.]
Commissioners.

108 STATE OF NEW YORK,
County of Suffolk, ss:

On this 20th day of August, 1900, before me personally came Thomas Young, Solomon Ketcham and Jonathan B. Terry, personally to me known and known to be the persons who signed the foregoing report, and severally acknowledged that they signed the same.

NATHAN O. PETTY,
Notary Public, Suffolk County, N. Y.

Final Judgment in Same Action, Made and Entered November 30, 1900.

At a Special Term of the Supreme Court of the State of New York, Held at the Kings County Court House, in the Borough of Brooklyn, on the 30th Day of November, 1900.

Present:

Hon. Josiah T. Marean, Justice.

HELEN T. SMITH and WILLIAM SIDNEY SMITH, Infants, by CORNELIA T. SMITH, Their Guardian ad Litem, Plaintiffs,
against
THE TRUSTEES OF THE FREEHOLDERS AND COMMONALTY OF THE TOWN OF BROOKHAVEN and CORNELIA T. SMITH, Defendants.

Final Judgment, 1900.

109 This action having been brought on to be heard upon report made on the 20th day of August, 1900, by Thomas Young, Solomon Ketcham and Jonathan B. Terry, the Commissioners appointed in and by the interlocutory Judgment herein bearing date the 5th day of February, 1900, which report was duly filed in the office of the Clerk of Suffolk County on the 26th day of September, 1900, by which report it appears that the said Commissioners have made partition of the premises, property and rights described in the complaint in this action between the plaintiff and defendants according to their respective rights and interests therein, as the same have been ascertained, declared and determined by this Court, and by which partition the said Commissioners have divided the whole of said premises, property and rights into two allotments, shares or parts of equal value, quality and quantity being considered, by a straight line beginning at a granite monument upon one side of which is engraved the letter "B" and on the opposite side the letter "S," set in the beach and meadow a few feet above ordinary high water mark on the North shore of said Great South Bay, near Hawkins Point (so called on the map filed with said report), and at a point due South from the apex of the tower of the Firemen's Truck House in the village of Bayport, L. I., and running thence due South across said Bay to the said Great South Beach and to another granite

monument marked with the letters "B" and "S" in like manner as said first mentioned monument, set upon the bluff or high ground a few feet to the South of the line of ordinary high water mark upon the South shore of said Great South Bay. And by which report it further appears that said Commissioners have set off and allotted to the plaintiffs, Helen T. Smith and William Sidney Smith, to be held by them in common, All that part of said premises, property and rights, with the appurtenances pertaining thereto, which
110 lies West of said line crossing the Great South Bay and containing as shown by the aforesaid Map, thirteen thousand three hundred and ninety-seven and one half acres, subject, however, to the dower right therein of the defendant, Cornelia T. Smith, which dower right has never been assigned. And that said Commissioners have set off and allotted to the defendants, The Trustees of the Freeholders and Commonalty of the Town of Brookhaven, all that part of said premises, property and rights, with the appurtenances, pertaining thereto, which lies East of said line crossing the said Great South Bay, and containing as shown by the said Map, seventeen thousand nine hundred and forty-seven and one half acres. And it appearing that no exceptions or objections to said report have been filed by any party to this action:

Now, on motion of Strong & Spear, attorneys for the plaintiffs herein, and after hearing Asa A. Spear, Esq., of counsel for said plaintiffs, and George H. Furman, Esq., of counsel for the defendants, the Trustees of the Freeholders and Commonalty of the Town of Brookhaven, and due deliberation having been had,

It is ordered, adjudged and decreed, that said Commissioners' Report, and all things therein contained, be and the same are hereby ratified and confirmed, and that the actual partition so made stand firm and effectual forever.

And it is further ordered, adjudged and decreed, that all that part of said premises, property and rights lying to the westward of the line running across the Great South Bay, hereinbefore described and represented on said partition map, and set apart and allotted to the said plaintiffs, Helen T. Smith and William Sidney Smith, being one equal part of said premises, property and rights, quality and quantity being considered, shall be and the same hereby is vested in
111 them, as tenants in common, to be held and enjoyed by them, their heirs and assigns forever, subject to the dower right therein of their mother, the defendant, Cornelia T. Smith, and that they be let into immediate possession thereof.

And it is further ordered, adjudged and decreed, that all that part of said premises, property and rights lying to the eastward of the line running across the Great South Bay, hereinbefore described and represented on said map, and set apart and allotted to the said defendants, The Trustees of the Freeholders and Commonalty of the Town of Brookhaven, being one equal half part of said premises, property and rights, quantity and quality being considered, shall be and the same hereby is vested in said defendant corporation in severalty, its successors and assigns forever, and that it be let into immediate possession thereof.

And it is further ordered, adjudged and decreed, that the said plaintiffs receive and hold said premises allotted to them, subject to all existing leases for oyster raising or other purposes which cover any portion of said premises until the expiration of said several leases, and that said defendant, The Trustees of the Freeholders and Commonalty of the Town of Brookhaven, receive and hold said premises allotted to it, subject to all existing leases for oyster raising or other purposes, which cover any portion of said premises until the expiration of said several leases, and that the said plaintiffs and said defendant apportion the rents accruing on all existing leases of said premises partitioned in this action or any part thereof between themselves as of the day of the date of this decree, And if they shall be unable to agree upon such apportionment either party shall be at liberty to apply to this Court for the appointment of a Referee under this decree, to make such apportionment.

112 It is further ordered, adjudged and decreed, that the plaintiffs have and recover their costs and disbursements of this action be taxed by the Clerk, amounting to the sum of Two hundred sixty-five 09/100 dollars, and the further sum of One thousand and twenty-six and 91/100 dollars for the fees and expenses of the said Commissioners, including the expenses of a survey, hereby taxed by the Court, and the further sum of one thousand dollars hereby granted them as an extra allowance herein.

And it is further ordered, adjudged and decreed, that the defendant, The Trustees of the Freeholders and Commonalty of the Town of Brookhaven, pay to the said plaintiffs, or their attorneys, one half part of said several sums hereby allowed for costs, disbursements, Commissioners' fees and allowance, amounting in the aggregate to Eleven hundred and forty-six dollars and that said plaintiffs do have and recover judgment in this action against said defendant, The Trustees of the Freeholders and Commonalty of the Town of Brookhaven, therefor.

Enter in Suffolk Co.,

J. T. M.

Granted Nov. 30, 1900.

PETER P. HUBERTY, *Clerk.*

113 Lease made by Cornelia T. Smith, Individually, and Cornelia T. Smith and Thomas S. Strong, as General Guardians of Helen T. Smith and William Sidney Smith, to The Lewis Blue Point Oyster Cultivation Company, dated March 1, 1901, for five years.

Oyster Lease No. 37.

This indenture, made the first day of March, one thousand nine hundred and one, between Cornelia T. Smith, Individually, and Cornelia T. Smith and Thomas S. Strong, General Guardians of Helen T. Smith and William Sidney Smith, parties of the first part, and The Lewis Blue Point Oyster Cultivation Company, of Sayville, Long Island, party of the second part, Witnesseth:—

That the said parties of the first part have letten, and by these presents do grant, demise and let, unto the said party of the second part, All that certain tract of land under the waters of the Great South Bay in the Town of Brookhaven, Suffolk County, New York, bounded and described as follows, to-wit: The following lots on Map of the Association Grounds, Numbers 282, containing seven (7) acres, and Numbers 244, 245, 246, 253, 254, 255, 272, 273, 278, 279, 280, 281, 284, 309, 310, 311, 312, 318, 319, 320, 321, 346, 347 and 348, each containing four (4) acres, and in all containing 103 acres, for the purpose of planting, cultivating, growing or laying down oysters thereon, with the appurtenances, for the term of five years from the first day of April, one thousand nine hundred and one, at the yearly rent or sum of One Hundred and Three Dollars, to be paid in advance on the first day of April in each and every year during said term.

And it is agreed that if any rent shall be due and unpaid,
114 or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said parties of the first part to re-enter the said premises and the same to have again, repossess and enjoy. And the said party of the second part covenants to pay to the said parties of the first part the said yearly rent as herein specified.

And the said party of the second part further covenants that it will not assign this Lease, nor let or underlet the whole or any part of the said demised premises without the written consent of the said parties of the first part, under the penalty of forfeiture and damages, and that it will not occupy or use the said premises, nor permit the same to be used or occupied for any other purpose than those above stated nor by any other person or persons than the lessors herein named without the like consent under the like penalty.

And the said party of the second part further covenants and agrees that it will not in any way obstruct, prevent or interfere with the ordinary navigation of the water over the ground hereby leased, and that it will keep stakes or buoys at all the corners and angles of said demised premises, with the number of said lots plainly marked upon the northwest corner stake or buoy.

And at the expiration of the said term the said party of the second part will quit and surrender the premises hereby demised in as good state and condition as reasonable use thereof for the purposes herein named will permit.

And the said parties of the first part do covenant that the said party of the second part, on paying the said yearly rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid, but it is understood that this covenant does not apply to the oysters planted or growing on said demised premises.

115 And it is further understood and agreed, That the covenants and agreements contained in the within Lease are binding on the parties hereto and their legal representatives.

In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

CORNELIA T. SMITH, [L. S.]
CORNELIA T. SMITH, *Guardian.* [L. S.]
THOMAS S. STRONG, *Guardian.* [L. S.]
THE LEWIS BLUE POINT OYSTER CULT'N CO.,
Per JAMES HERRING, *Secty & Treas.* [L. S.]

Sealed and Delivered in the Presence of
SELAH S. STRONG,
As to Thomas S. Strong, Guardian.

Also extension of said lease for five years from April 1, 1906, and dated April 11, 1906.

Within Lease is hereby extended five years from April 1st, 1906. Dated April 11, 1906.

CORNELIA T. SMITH, [L. S.]
HELEN T. SMITH, [L. S.]
WM. S. SMITH, [L. S.]
By ASA A. SPAR, *Att'y.*
THE LEWIS BLUE POINT OYSTER CULTIVATION CO.
M. S. LEWIS, *Pres.*

116 Lease made by same parties to the same for five years from April 1, 1901, and dated March 1, 1901.

Oyster Lease No. 38.

This indenture, made the first day of March, one thousand nine hundred and one, between Cornelia T. Smith individually, and Cornelia T. Smith and Thomas S. Strong, General Guardians of Helen T. Smith, and William Sidney Smith, parties of the first part, and The Lewis Blue Point Oyster Cultivation Company, of Sayville, Long Island, party of the second part, Witnesseth:

That the said parties of the first part have letten, and by these presents do grant, demise and let, unto the said party of the second part, all that certain tract of land under the waters of the Great South Bay in the Town of Brookhaven, Suffolk County, New York, bounded and described as follows, to wit: The following lots on the Map of the Association Grounds: Numbers 179, 180, 195, 196, 202 and 203, each containing four (4) acres and Numbers 237, 238 and 239, each containing four acres, and 259 and 260, each containing two acres, in all containing 40 acres, for the purpose of planting, cultivating, growing or laying down oysters thereon, with the appurtenances, for the term of five years from the first day of April, one thousand nine hundred and one, at the yearly rent or sum of forty dollars, to be paid in advance on the first day of April in each and every year during said term.

And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful the said parties of the first part to re-enter the said premises and the same to have again, repossess and enjoy.

And the said party of the second part covenants to pay to
117 the said parties of the first part the said yearly rent as herein specified.

And the said party of the second part further covenants that it will not assign this lease, nor let or underlet the whole or any part of the said demised premises, without the written consent of the said parties of the first part, under the penalty of forfeiture and damages, and that it will not occupy or use the said premises, nor permit the same to be occupied or used for any other purpose than those above stated nor by any other person or persons than the lessors herein named without the like consent under the like penalty.

And the said party of the second part further covenants and agrees that it will not in any way obstruct, prevent or interfere with the ordinary navigation of the water over the ground hereby leased and that it will keep stakes or buoys at all the corners and angles of said demised premises, with the number of said lots plainly marked upon the northwest corner stake or buoy.

And at the expiration of the said term the said party of the second part will quit and surrender the premises hereby demised, in as good state and condition as reasonable use thereof for the purposes herein named will permit.

And the said parties of the first part do covenant that the said party of the second part, on paying the said yearly rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid, but it is understood that this covenant does not apply to the oysters planted or growing on said demised premises.

And it is further understood and agreed, that the covenants and agreements contained in the within Lease are binding on the parties hereto and their legal representatives.

118 In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

CORNELIA T. SMITH, [L. S.]
CORNELIA T. SMITH, *Guardian.* [L. S.]
THOMAS S. STRONG, *Guardian.* [L. S.]
THE LEWIS BLUE POINT OYSTER CULT'N CO.,
Per JAMES HERRING, [L. S.]
Secty. & Treas'r.

Sealed and delivered in the presence of
SELAH B. STRONG,
As to Thomas S. Strong, Guardian.

Also extension of said lease for five years from April 1, 1906, and dated April 11, 1906.

Within Lease is hereby extended five years from April 1st, 1906. Dated April 11, 1906.

CORNELIA T. SMITH, [L. S.]
HELEN T. SMITH, [L. S.]
WM. S. SMITH, [L. S.]
By ASA A. SPEAR, *Att'y.*
THE LEWIS BLUE POINT OYSTER CULTIVATION CO.
M. S. LEWIS, *Pres.*

119 *Opinion.*

Supreme Court, Suffolk County.

THE LEWIS BLUEPOINT OYSTER CO.
vs.
J. MARVIN BRIGGS.

The plaintiff is the lessee of certain lands under the waters of the Great South Bay in the County of Suffolk. These lands are leased for, and at the time of the commencement of this action, were actually used for the cultivation of oysters, plaintiff at that time having a large quantity of oysters planted thereon. The title of plaintiff's lessor to this submerged land is fixed and settled beyond question.

Trustees of Brookhaven vs. Strong, 60 N. Y., 56.
Lowndes vs. Huntington, 153 U. S., 1.

In addition to this the parties concede such private ownership and concede that plaintiff's lessor is seized in fee simple absolute of the premises described in the complaint.

The defendant is a contractor under a contract made with the United States Government through its proper officers, under which the defendant engages to dredge a channel two hundred feet wide and two thousand feet long to a depth of ten feet diagonally across the lands above mentioned, upon which the plaintiff is
120 engaged in oyster cultivation. It is conceded that the waters covering such lands are navigable waters, and are used for commerce and navigation.

This action is brought to restrain the defendant in the prosecution of such work, and thereby this question is presented to the Court for determination, has the defendant herein, under the terms of his contract entered into with the Government of the United States, under the provisions of the Constitution and laws of the United States applicable thereto, the right to enter into and upon the said fishing rights and lands under water for the purposes of commerce and of improving navigation, without compensation? In other words, has the United States any right which is paramount to the right of the plaintiff to enter into and upon the fishing rights and lands under water mentioned herein, for the purposes of commerce, without compensating plaintiff?

The plaintiff insists that his title to this land under water is the same as the title to his upland, and without compensation the Government has no more right to invade this property than it would have to invade his dwelling house. While the plaintiff's lessor concededly has title to this land under water, and the plaintiff has succeeded to all his rights so far as this action is concerned, I am of the opinion that his title is not and cannot be the same as the title to his upland. It has been held recently that the title to lands under water in this Bay is subject to the right of the owner of the adjoining upland to construct a pier on the land under water beyond high water mark for his own use or the use of the public.

Town of Brookhaven vs. Smith, 188 N. Y., 74.

It is therefore at once apparent that the title to such sub-
121 merged land is not the same absolute unqualified title as that by which a person holds his uplands. The title to these lands is subject to at least this one easement. In addition to this isn't it subject to the right of the Federal Government to dredge it for the purpose of improving navigation? These lands were granted by the King of England by three several patents dated 1666, 1686 and 1693, which purported to and did convey all right, title, and interest which he had in and to the premises. At the time of making said patents the title to said lands under water was a part of the jura regalia of the King of Great Britain, by virtue of which he was seized and possessed of an estate in fee simple absolute in said lands, and all the title which he possessed passed under said patents. The said lands were held by the King in trust for the public uses of fishery and navigation and the erection thereon of wharves, piers, lighthouses, beacons, and other facilities of navigation and commerce. The King could grant no title other than he himself held. The title, being subject in his hands to this trust, they passed to his grantee subject to the same trust. Being subject to this trust they were publici juris. In other words, so far as commerce and navigation required, they were held for the use of the people at large.

In Stockton vs. Baltimore & N. Y. R. Co., 32 Fed., 9, it was sought at the suit of the Attorney-General of the State of New Jersey to restrain the erection of a bridge across Arthur Kill, between New Jersey and Staten Island in New York State, upon the lands of the State of New Jersey situate upon the shore and under the waters of said kill. It was held that the United States Government was not obliged to make compensation for such lands as it occupied for the abutments to said bridge. The opinion indicates that these lands were leased for oyster culture and that the state derived
122 a revenue therefrom, but still it was held that this property is not private property within the intent and meaning of the Fifth Amendment of the Constitution of the United States. It cannot be that this was because the state owned it, because the United States Government has no right to appropriate other species of property belonging to the individual state, and in this very opinion this is conceded as too well established for argument. The reason of it then must be because of something in the title by which this

species of property is held; an inherent trust which attaches to this species of property in whosoever hands it may be, whether individual or corporate, and whether such corporation be public or private. If this species of property in the hands of the state is subject to a trust, how is it impressed? There is no suggestion that it is impressed in any other way or manner than by the nature of the property itself. The trust, if it exists at all, cannot be divested by conveyance to an individual. It must in his hands be subject to the same trust as in the hands of the state.

If the United States Government could appropriate without compensation a portion of the property described in the complaint as a site for a light house, or any other aid to navigation, then it must be conceded that it has the right to dredge a channel across this property in aid of navigation. In the Hawkins Point Light House case (Chappell vs. Waterworth, 39 Fed. Rep., 77) the plaintiff held a grant from the State of Maryland of the submerged soil upon which the Federal Government erected a light house, and it had not been condemned or any compensation paid or tendered for it, and the plaintiff had also, as the riparian owner of the neighboring shore, the right to improve out into the river over the light house site. It was there held that plaintiff's ownership of the soil under navigable waters was subject to the right of the United States
123 in aid of navigation to erect a light house thereon, and that by such use the United States was not taking private property within the meaning of the Fifth Amendment of the Federal Constitution. In the opinion in that case it is said, "But while the submerged land remains a part of the bed of the river it is not private property within the meaning of the Fifth Amendment to the Federal Constitution. As was declared in Gilman vs. Philadelphia, 3 Wall., 725, the navigable waters 'are the public property of the nation and subject to all the requisite legislation by Congress.' In the hands of the state or of the state's grantee the bed of a navigable river remains subject to an easement of navigation which the general government can lawfully enforce, improve and protect."

These navigable waters are concededly a public highway, and the plaintiff's rights in the soil under these waters are similar to those of the owners of the soil in a public highway upon the upland. The owner of the soil in either case is entitled to make such use of the soil as does not interfere with the use of the highway. On the upland the owner has the right to the herbage, to minerals under the soil, and to plant and harvest upon the margin of the highways such crops as do not interfere with the use of the highway. But these rights are at all times subject to the right of the proper authorities to work such highway in such manner as may best fit it for public use, even though it lessen some of the rights of the owner of the soil therein and absolutely destroy some of his rights. The lands under water are, I apprehend, in the same position. The owner may make such use of them as does not interfere with navigation. He may plant his crop and may harvest and market it, but it is all the time subject to hazard of an improvement of the highway in which it is planted. In Lane vs. Smith, 71 Conn., 65, and Lane vs. Harbor

Com'rs, 70 Conn., 685, it was held that the owner of oysters
124 lawfully planted in the bed of a navigable stream is not entitled to compensation when such oysters are destroyed by dredging said stream under competent authority to improve navigation.

These views necessarily lead to the conclusion that the defendant is entitled to judgment dismissing the complaint and dissolving the injunction.

WALTER H. JAYCOX,
Justice Supreme Court.

Waiver of Certification.

It is hereby stipulated that the foregoing are correct copies of the judgment roll, the case on appeal as settled, containing all the evidence, the exhibits and notice of appeal and exceptions. And the certification thereof pursuant to Sections 1353 and 3301 of the Code of Civil Procedure, or otherwise, is hereby waived.

Dated Brooklyn, April 20, 1908.

ASA A. SPEAR,
Attorney for Plaintiff.
WILLIAM J. YOUNGS,
United States Attorney and Attorney for Defendant.

125 *Consent and Order Settling and Filing Case.*

Upon the annexed consent it is ordered, that the foregoing case on appeal be settled as printed, and that it be filed in the office of the Clerk of Suffolk County, with the judgment roll as the settled case on appeal herein.

Dated Brooklyn, April 20, 1908.

WALTER H. JAYCOX, *J. S. C.*

We hereby consent to the making and entry of the foregoing order.

ASA A. SPEAR,
Plaintiff's Attorney.
WILLIAM J. YOUNGS,
United States Attorney and Attorney for Defendant.

126 At a Term of the Appellate Division of the Supreme Court Held in and for the Second Judicial Department at the Borough of Brooklyn, on the 30th day of December, 1908.

Present—Hon. —— ——, Presiding Justice.
" " John Woodward,
" " Almet F. Jenks,
" " William J. Gaynor,
" " Warren B. Hooker,
" " Nathan L. Miller, Justices.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY,
Appellant,
vs.
J. MARVIN BRIGGS, Respondent.

Order of Affirmance on Appeal from Judgment.

The above named, The Lewis Blue Point Oyster Cultivation Company, the plaintiff in this action having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court entered in the office of the Clerk of the County of Suffolk on the 25th day of February, 1908, and the said appeal having been argued by Mr. Asa A. Spear, of Counsel for the appellant and by Mr. Selah B. Strong, Ass't U. S. Attorney, of Counsel for the Respondent, and due deliberation having been had thereon, and the Court having unanimously decided that the findings of fact are supported by the evidence,

127 It is hereby ordered and adjudged that the judgment so appealed from be and the same is hereby affirmed; and that the respondent recover of the appellant the costs of this appeal.

Enter.

ALMET F. JENKS, *Acting P. J.*

Supreme Court, Appellate Division, Second Department.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY,
Appellant,
against
J. MARVIN BRIGGS, Respondent.

Judgment Jan'y 13, 1909, *at* 12 *M.*

The plaintiff having appealed from the judgment entered herein on the 25th day of February, 1908, in favor of the defendant and dismissing the complaint on the merits to the Appellate Division of this court, and the said Appellate Division having rendered a decision affirming in all things the said judgment with costs of said appeal.

Now, on motion of William J. Youngs, United States Attorney for

POOR

the Eastern District of New York and attorney for the respondent, it is

Ordered, that the above-named defendant have judgment against the above-named plaintiff in the sum of Seventy-eight and 50/100 dollars ($78.50) costs and disbursements of said appeal as taxed.

WM. F. FLANAGAN, *Clerk.*

128 Supreme Court, Appellate Division, Second Department.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY,
Appellant,
against
J. MARVIN BRIGGS, Respondent.

Notice of Appeal to Court of Appeals.

Please take notice that the above named Appellant hereby appeals to the Court of Appeals from the judgment of the Appellate Division of the Supreme Court for the Second Department entered herein in the Office of the Clerk of the County of Suffolk on the thirteenth day of January, 1909, affirming the judgment of the Special Term of the Supreme Court entered in said Office on the 25th day of February, 1908, with $78.50 costs, and said Appellant appeals from each and every part of said judgment as well as from the whole thereof.

Dated January 22nd, 1909.

ASA A. SPEAR,
Attorney for Appellant.

To William F. Flanagan, Esq., Clerk of the County of Suffolk.
William J. Youngs, Esq., United States Attorney and Attorney for Respondents.

129 *Opinion of Appellate Division.*

Supreme Court, Appellate Division, Second Judicial Department.

Woodward, Jenks, Hooker, Gaynor and Miller, JJ.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY,
Appellant,
against
J. MARVIN BRIGGS, Respondent.

Appeal by the Plaintiff from a Judgment for the Defendant on the Merits Entered Upon a Decision of the Suffolk Special Term.

This is a suit to restrain the defendant from dredging out a channel 200 feet wide across a tract of land under water in Great South Bay, Long Island, N. Y., on which the plaintiff, as lessee of the

owners, has beds of oysters which it brought from a distance and cast overboard there, in order that they might grow larger and improve and then be taken up for market. The defendant has a contract with the government of the United States to do the said work for the improvement of navigation. The said bay is a navigable arm of the sea. The plaintiff claims it cannot be deprived of its oysters by the dredging of the defendant, and that the said
130 use of the land under water cannot be impaired in the future thereby, without compensation being first made therefor, on the ground that the said oysters and use are private property within the fifth amendment of the constitution of the United States which forbids the taking of private property by government without just compensation.

The lessors of the plaintiff derive title through a grant of the British crown when New York was a British colony, the said bay being included in the tract of lands described by metes and bounds in the said grant, which also conveys as appurtenances all and every of the rights of "fishing, fowling, hunting, hawking," etc.

Asa A. Spear for the appellant.
Selah B. Strong for the respondent.

GAYNOR, *J.*:

After the absolutism of the King was destroyed by Magna Charta, at all events, it became a settled principle tenaciously clung to until it became undisputed, that public rights, like that of navigation in the navigable waters of the realm, were inalienable by the King, being vested in him not individually, but in the crown of sovereignty in trust for the people at large. The crown grant under which the plaintiff's lessors derive whatever title they have to Great South Bay is subject to this principle, if there were need to invoke it. But the terms of the said grant do not purport to grant in whole or in part, or to impair in any way, the public right of navigation. The grantees took subject to such public right (Moore's Hall History & Law of the Foreshore, 3rd Ed., pp. 446, 533). This the learned counsel for the plaintiff admits, but seeks to reduce the servi-
131 tude to the navigation of the bay in its natural state at the time of the grant, and as it should thereafter be at any given time from generation to generation, unchanged except by wind and tide. These are the words of his brief: "We do not claim the absolute ownership of these lands under water and fishing rights subject to no servitude whatever; they are subject to the public right of navigation. But this servitude is the navigation of the bay in its natural state." On the contrary, the public right of navigation always included the right of government to facilitate and improve navigation, by the erection of beacons, the removal of obstructions, the cutting and deepening of channels, etc.; which latter right in this country is vested in the national government by the provision of its constitution for the regulation of commerce with foreign countries and among the states (Gilman v. Philadelphia, 3 Wall., 725; Pennsylvania v. Wheeling, etc., Bridge Co., 18 How., 421; S. C. v. Ga., 93 U. S., 4; Shively v. Bowlby, 152 U. S., 1; Gibson v. U. S.,

166 U. S., 269). And the grantees from the crown in this case took subject to this measure of the public right of navigation. It could hardly be contended that the government could not appropriate an acre of these lands under the waters of this Bay to set a light house and its appurtenances on it without compensating the plaintiff and his lessors for the use thereof they would thus be deprived of. The right of such public use existed when the sovereign grant under which they claim was made, and was in no way impaired thereby. Whatever right the plaintiff and its lessors may have to deposit oysters, or hides for the tannery, or any other chattels, on the bottom of this bay, is subject to such public use, and therefore an obligation to remove such property and surrender possession of the land
132 for such public use at any time. The same is the case in respect of the government keeping or providing a sufficient depth of water to meet the necessities of navigation from generation to generation as channels shift or fill up, or the draughts of vessels are made deeper.

Notwithstanding the said admission in the plaintiff's brief, the contention seems to be mooted that the express grant of the right of fishing being made, it excluded every other right in the crown to the extent that they should be inconsistent with each other. The rule in respect of public grants is the reverse, i. e., that nothing is granted thereby unless expressly. They are construed strictly against the grantees (Id., p. 782). Moreover, the contention could only be applicable where the thing claimed is something the crown could grant. It may also be well to note that the plaintiff is not exercising a right of fishery in this bay. He is only using it as a depository of oysters brought from elsewhere to be improved in size and flavor by its peculiar bottom and mixture of salt and fresh water.

If the government or the defendant should enter upon the plaintiff's oyster beds and destroy or take up the oysters without giving the plaintiff reasonable opportunity to take them up and remove them, an entirely different question would be presented.

The judgment should be affirmed.

To Court of Appeals of the State of New York:

In pursuance of the Statute in such case made and provided, I hereby return to this Honorable Court a copy of Judgment Roll and Copy of the Notice of Appeal from said Judgment, in the
133 case of The Lewis Blue Point Oyster Cultivation Company, Plaintiff-Appellant, against J. Marvin Briggs, Defendant-Respondent, and I do certify that the foregoing are true copies of the said Judgment Roll and Notice of Appeal as the same remain on file in the office of the Clerk of Suffolk County, N. Y.

Witness my hand and official seal at Riverhead, N. Y., March 1, 1909.

[L. S.] WM. F. FLANAGAN, *Clerk.*

134 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, Held at the Capitol, in the City of Albany, on the 26th Day of April, in the Year of our Lord One Thousand Nine Hundred and Ten, Before the Judges of said Court.

Witness, the Hon. Edgar M. Cullen, Chief Judge, presiding.

R. M. Barber, Clerk.

Remittitur, April 27th, 1910.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, Appellant,
ag'st
J. MARVIN BRIGGS, Respondent.

Be it remembered, That on the 4th day of March in the year of our Lord one thousand nine hundred and nine The Lewis Blue Point Oyster Cultivation Company, the appellant in this action, came here into the Court of Appeals, by Asa A. Spear, its attorney, and filed in the said Court a Notice of Appeal and return thereto from the Judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And J. Marvin Briggs, the respondent in said action, afterwards appeared in said Court of Appeals by William J. Youngs, his Attorney.

135 Which such Notice of Appeal and the return thereto filed as aforesaid, *and* hereunto annexed. Whereupon, the said Court of Appeals having heard this cause argued by Mr. A. A. Spear of counsel for the appellant, and by Mr. Selah B. Strong, 3rd of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from in this action, be in all things affirmed. And it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this Court.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be in all things affirmed with costs as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals, remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case

made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

136 COURT OF APPEALS,
Clerk's Office, ss:

ALBANY, *April 27th,* 1910.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

[L. S.] R. M. BARBER, *Clerk.*

Endorsed: Filed June 9, 1910. W. F. F., Clerk.

137 STATE OF NEW YORK,
Court of Appeals,
State Reporter's Office, ss:

I, J. Newton Fieror, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of The Lewis Blue Point Oyster Cultivation Co., App'l't, v. J. Marvin Briggs, Resp'd't, decided by the Court of Appeals on the 26th day of April 1910, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 6th day of April 1911.

J. NEWTON FIEROR,
As Reporter of the Court of Appeals
of the State of New York.

Attest:

[Seal State of New York Court of Appeals.]

R. M. BARBER,
Clerk of the Court of Appeals.

STATE OF NEW YORK,
Court of Appeals:

I, Edgar M. Cullen, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that R. M. Barber is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that J. Newton Fieror is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and, I further certify

that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of The Lewis Blue Point Oyster Cultivation Co., App'l't, v. J. Marvin Briggs, Resp'd't, decided by the said Court of Appeals on the 26th day of April 1910; is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of R. M. Barber as ture of said R. M. Barber, and the signature of J. Newton Fieror, as reporter of said court, appended thereto is the true and genuine signature of said J. Newton Fieror.

In witness whereof, I have hereunto subscribed my official signature, at the Chambers of said court, at the Capitol of said State, in the City of Albany and State of New York, on the 6th day of April in the year of one thousand, nine hundred and eleven.

EDGAR M. CULLEN,
As Chief Judge of the Court of Appeals
of the State of New York.

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(198 N. Y., 287.)

Opinion of Court of Appeals.

Decided April 26, 1910.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, Appellant,
v.
J. MARVIN BRIGGS, Respondent.

Appeal from a Judgment of the Appellate Division of the Supreme Court, in the Second Judicial Department, Affirming a Judgment Entered upon a Decision of the Court at Special Term Dismissing the Complaint.

This action was brought to restrain the defendant from digging or dredging upon certain lands under the waters of Great South Bay, in the County of Suffolk, in such a way as to disturb the oysters planted by the plaintiff.

The defendant by his answer denied the jurisdiction of the court over the subject matter of the action, upon the ground that the plaintiff seeks to restrain the improvement of navigation incident to the regulation of commerce over the navigable waters of Great South Bay, although such improvement has been duly authorized by Congress and the defendant has entered into contract with the United States Government to make the same. The defendant also pleaded such contract in justification of his proposed action, and alleged that all the rights of the plaintiff are subject and subservient to the right of Congress to regulate commerce and navigation.

The court found in substance that certain persons, who, under three colonial patents made in 1666, 1686 and 1693, own the land in question, including the exclusive right of fishery thereon, leased the same

to the plaintiff for the period of ten years from April 1, 1901,
139 for the purpose of planting, cultivating and growing oysters; that the plaintiff at great expense staked and buoyed the land and planted thereon a large quantity of oysters, which are his private property and worth more than $5,000; that said lands are under the navigable waters of Great South Bay, an arm of the sea, over which registered and enrolled vessels pass for the purpose of commerce between the States; that the defendant is under contract with the Federal Government, duly made pursuant to an act of Congress on the 21st of May, 1906, to dredge a channel 2,000 feet long and 200 feet wide, which will pass diagonally over the land in question, for the purpose of increasing the depth of water in aid of commerce and navigation; that the digging of such channel across said land would destroy the oysters of the plaintiff not only along the line of excavation, but for some distance upon either side thereof, and would materially reduce the value of the land for oyster cultivation; that the right to dig said channel has not been acquired by consent or condemnation, nor otherwise than through said contract made pursuant to the act of Congress aforesaid; that when the defendant began to dig said channel he was notified by the plaintiff to desist, but he refused unless enjoined by the court.

Among other conclusions of law the court found that the right of the United States and of the defendant as their agent to enter upon said lands and fishing rights without making compensation for the purpose of commerce and the improvement of navigation is paramount to the rights of the plaintiff or his lessors. The complaint was dismissed on the merits, and the injunction theretofore granted pendente lite was vacated. From the judgment of the Appellate
140 Division unanimously affirming the judgment of the Special Term this appeal was brought.

A. A. Spear, for appellant; Selah B. Strong, 3d, for respondent.

VANN, *J.*—The learned counsel for the appellant, with the discrimination of a lawyer who understands his case, has made certain concessions which limit discussion to a single question. He admits that neither the plaintiff nor its lessors have any control of the right of navigation over the land in question because the patents from the crown, which are silent upon the subject, must be taken most strongly against the grantees. He further admits that their rights are subject to the public right of navigation, but he insists that such right is confined to navigation of the bay in its natural state without disturbing the surface of the land under water by artificial means. The only question he presents for decision, as stated in his own words, is as follows: "Is the authority of the United States for the regulation of commerce between the States and to improve navigation in navigable waters paramount to the private property rights and exclusive private fishery rights of the plaintiff and its lessors?"

The King of England had title to the land under the navigable waters throughout his kingdom as his private property, which he could dispose of as he saw fit without restraint or hindrance from the law. This was known as the jus privatum held by him in his indi-

vidual capacity (Commonwealth v. Alger, 7 Cush., 53, 82,
141 90; Hale De Jure Maris, 11; Hargrave's Law Tracts, 84, 89).
The king also had title, as sovereign and in no sense as proprietor, to the navigable waters themselves within rivers and arms of the sea where the tide ebbed and flowed, but he held them in trust for his people, and he could not dispose of them by grant or otherwise. They were incapable of private ownership, for they were the jus publicum held by the king in a representative capacity (Id.; Brackton b, 2, ch. 5, sec. 7; Moore's History of the Foreshore, 446, 583, 782; Hale De Partibus Maris, 85).

"The jus privatum of the owner or proprietor," said Lord Hale, "is charged with and subject to that jus publicum which belongs to the king's subjects; as the soil of a highway is, which though in point of property it may be a private man's freehold, yet it is charged with the public interest of the people, which may not be prejudiced or damnified" (Hale's De Jure Maris, chap. 6).

To the ancestors and grantors of the plaintiff's lessors, the king granted the jus privatum to the locus in quo, but the jus publicum under the right of conquest and the treaty of peace made after the revolutionary war went to the original States and when the constitution was adopted became subject to the rights surrendered thereby to the United States (Shively v. Bowlby, 152 U. S., 1; Town of Brookhaven v. Smith, 188 N. Y., 74; Barnes v. Midland R. R. Terminal Co., 193 N. Y., 378).

The plaintiff and its lessors have no more than the king had, as proprietor, and the question is what did he hold in his individual capacity? Assuming that he conveyed all that he could convey,
what is the measure of the title conferred? Was his title to
142 land under navigable waters, and is the title of his grantees so absolute as to prevent improvement by the general government for the benefit of navigation, as a matter of right and without making compensation, or was the jus privatum, which is conceded to be subject to the easement of navigation, also subject by necessary implication from the nature of that easement, to the right to promote navigation by increasing the depth of the water so that vessels of larger draft and greater tonnage can pass in safety? Is the grant of submerged soil which is so directly connected with the public right of navigation as to be incapable of complete separation therefrom, subordinate thereto to the extent necessary to promote and develop commerce?

In patents from sovereign to subject the rule of construction which controls deeds between individuals is reversed and the terms are taken most strongly against the grantee, because the public interest is involved. For the same reason it is held that from grants of water land there is impliedly reserved the right of navigation, and as a necessary part of so important a subject, the right to improve navigation for the benefit of commerce.

Upon the doctrine of implied reservation in grants of the crown, which rests on broad principles of public policy, we think the public right should be held to embrace whatever is essential to the interests of commerce and that the private right is subject thereto. As the

king could not grant to a subject the public right of navigation, he could not grant to a subject a right so blended therewith as to be in effect a part thereof, and, hence, the right to dredge land
143 under water for the improvement of navigation was reserved from the general terms of the grant by necessary implication. The patents in question are silent upon the subject of navigation in any phase. The crown did not grant any right that might interfere with navigation in its broad sense, because it could not, and the patents should be construed accordingly. The right to dig a channel is analogous to the right to build a lighthouse upon submerged land granted to private individuals, or to fasten buoys thereto, or to blast out rocks and remove natural obstructions therefrom (South Carolina v. Georgia, 93 U. S., 412; Gibson v. United States, 166 U. S., 269; Eldridge v. Trezevant, 160 U. S., 452).

In Sage v. Mayor, &c., of N. Y. (154 N. Y., 61, 79), after reviewing many authorities, we held that "it is a logical deduction from the decisions in this State that as against the general public through their official representatives riparian owners have no right to prevent important public improvements upon tidewater for the benefit of commerce. The principle upon which the rule rests, although sometimes foreshadowed, has not been clearly set forth. Although, as against individuals or the unorganized public, riparian owners have special rights to the tideway that are recognized and protected by law as against the general public, as organized and represented by government, they have no rights that do not yield to commercial necessities except the right of pre-emption when conferred by statute, and the right to wharfage when protected by a grant and covenant on the part of the State, as in the Langdon and Williams cases. I think that the rule rests upon the principle of implied reservation,
144 and that in every grant of lands bounded by navigable waters where the tide ebbs and flows, made by the crown or the State as trustee for the public, there is reserved by implication the right to so improve the water front as to aid navigation for the benefit of the general public, without compensation to the riparian owner. The implication springs from the title to the tideway, the nature of the subject of the grant and its relation to navigable tidewater, which has been aptly called the highway of the world. The common law recognizes navigation as an interest of paramount importance to the public. Thus, when the king used to grant an exclusive right of fishing in navigable tidewater, as once he lawfully might, if in the course of time the nets or weirs interfered with navigation they became a nuisance and could be abated as such. The grant was silent upon the subject, yet the courts held that whatever impeded the superior right of navigation was impliedly excepted from the effect of the grant. So, as it seems to me, when any public authority conveys lands bounded by tidewater, it is impliedly subject to those paramount uses to which government, as trustee for the public, may be called upon to apply the water front for the promotion of commerce and the general welfare. * * * We think * * * that the conveyance of the uplands in question to a subject should, from public considerations of the highest importance, be held to

have been made with the implied reservation of the right to freely improve the navigation of the great seaport within the general limits of which said uplands were situated."

Much of this extract was quoted with approval by the Supreme Court of the United States in Scranton v. Wheeler (179
145 U. S., 161), and while neither case is strictly analogous in its facts to the case now before us, both rest upon a principle which controls the question under consideration. In Scranton v. Wheeler the title of the riparian owner extended to the middle line of St. Mary's River, which forms part of the boundary between the United States and Canada and is a highway for interstate and international commerce. The general government under the authority of Congress constructed a pier resting on the submerged land for the purpose of improving the navigation of the river, and it was held that the prohibition of the Constitution of the United States against taking private property for public use without just compensation had no application. The title of the plaintiff in that case, although it did not come from the crown, was of the same nature as the title in this case, for it came from sovereign authority.

In South Carolina v. Georgia (93 U. S., 4) it was held in substance that the right to regulate commerce includes the right to regulate navigation, and, hence, to regulate and improve navigable rivers and ports on such rivers, and an appropriation for the improvement of a harbor or a navigable river "to be expended under the direction of the Secretary of War" confers upon that officer the discretion to determine the mode of improvement.

In Gibson v. United States (166 U. S., 269, 271) the court said: "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the
146 servitude in respect of navigation created in favor of the Federal Government by the constitution" (see also Martin v. Waddell, 16 Pet., 367; State of Pennsylvania v. Wheeling & B. Bridge Co., 18 How., U. S., 421; Gilman v. Philadelphia, 3 Wall., 713; Commonwealth v. Alger, 7 Cush., 53; Lane v. Harbor Comm'rs, 70 Conn., 685; Lane v. Smith, 71 Conn., 65; Stockton v. Balt. & N. Y. R. R., 32 Fed. Rep., 9; Chappell v. Water Works, 39 Fed. Rep., 77). Not all of these cases proceed expressly upon the principle of implied reservation, but whenever a patent from the crown was involved that principle was involved, for the patent is a contract protected by the Fifth Amendment to the Federal Constitution. Some of the cases are placed upon the ground that the title to submerged land, from whatever source it came, was acquired subject to the rights which government, representing the public, has to improve navigation (Scranton v. Wheeler, 179 U. S., 141, 163). This recognizes the principle by stating the effect thereof.

The case of Monongahela Navigation Co. v. United States (148 U. S., 312), which is relied upon by the appellant, is not analogous. The plaintiff in that case had a franchise granted by a statute of the State to erect a lock and dam in a navigable river. It also had the

consent of Congress. It was held that after the lock and dam had been constructed and the plaintiff was receiving tolls for its use, the Federal government could not take the franchise or the tangible property without paying for it. Mr. Justice Brewer, speaking for all the judges who took part in the decision, said: "In this case there was not only the full authority of the State of Pennsylvania, but also, so far as respects this particular lock and dam, they were constructed at the instance and implied invitation of Congress. The Act of March 3, 1881, making an appropriation for the improvement of the river, in terms provided that no such improvement should be made until the Navigation Company had in good faith started upon the building of this lock and dam. * * * This is something more than the mere recognition of an existing fact; it is an invitation to the company to do the work; and when in pursuance of that invitation and under authority given by the State of Pennsylvania, the company has constructed the lock and dam, it does not lie in the power of the State or the United States to say that such lock and dam are an obstruction and wrongfully there or that the right to compensation for the use of this improvement by the public does not belong to its owner, the Navigation Company" (p. 334).

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This court held the same way under somewhat similar circumstances in Langdon v. Mayor, &c., of N. Y. (93 N. Y., 129), and Williams v. Mayor, &c., of N. Y. (105 N. Y., 419). both of which are cited and distinguished in Sage v. Mayor, &c., of N. Y. (supra).

We think that the plaintiff has no right in the land under water that is not subject to the power of the United States to construct the improvement in question without making compensation to it. It ran the risk when it planted its oysters that the crop might be interfered with whenever Congress decided to dig a channel or otherwise improve navigation in Great South Bay for the benefit of commerce. Its loss may be severe, but Congress is not apt to deal ungenerously with those who have good grounds for relief.

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The judgment should be affirmed, with costs.

Cullen, Ch. J; Gray, Edw. T. Bartlett, Haight, Werner and Hiscock, JJ., concur.

Judgment affirmed.

149

[Endorsed:] Court of Appeals of the State of New York. The Lewis Bluepoint Oyster Cultivation Company, Appellant, against J. Marvin Briggs, Respondent. Opinion.

150 Supreme Court of the United States.

THE LEWIS BLUEPOINT OYSTER CULTIVATION COMPANY, Plaintiff-in-Error,
against
J. MARVIN BRIGGS, Defendant-in-Error.

Petition for Writ of Error.

Now comes The Lewis Bluepoint Oyster Cultivation Company by Wing & Russell, its attorneys, and says:—

I. It is the plaintiff in a cause commenced in the Supreme Court, for the County of Suffolk, in the State of New York, against J. Marvin Briggs, the defendant, the same being an action in equity brought by plaintiff to restrain defendant from entering upon the lands under water of the plaintiffs in the Great South Bay, for the purpose of digging or dredging in the same.

This cause proceeded to final judgment in the said Supreme Court in favor of the said defendant, and was thereupon afterwards appealed by plaintiff to the Appellate Division of the Supreme Court of the State of New York, in the Second Department, and said judgment was by said Appellate Division affirmed. Said cause was thereupon afterwards appealed by the plaintiff to the Court of Appeals of the State of New York; said Court of Appeals being the final Court of Appeal and Review in this State, and the highest Court in the State in which a decision in the cause could be had.

151 II. The demand of said plaintiff in said suit was the enjoining and restraining of the defendant from entering upon the said lands under the waters of the Great South Bay, in the State of New York, of which lands the plaintiff is the lessee, for the purpose of digging or dredging, and from digging or dredging in or upon the said lands, or any portion thereof, for any purpose whatsoever; and from in any manner disturbing the said lands or the oysters growing thereon, which are the property of the plaintiff.

The defendant claimed the right to enter upon and dredge the said lands under his contract with the United States, and that the said dredging was done and to be done by him under the direction of the said United States for the purpose of improving the navigation incident to regulating commerce upon the said lands under water; and said defendant claimed that the United States had the right and authority to permit defendant to take possession of and dredge said lands of said plaintiff, without giving it any compensation therefor. The said plaintiff thereupon claimed that the defendant could not do said things unless plaintiff was justly compensated, and plaintiff claimed its right to such compensation under the Constitution of the United States, especially Article V of the Amendments thereof and the Federal Statutes enacted pursuant thereto,

And claimed, furthermore, that to permit the taking of its property in the manner above set forth, without giving it just compensa-

tion, as provided by the Constitution, was to deprive the plaintiff of its property without due process of law.

152 III. The said cause was duly heard in said Court of Appeals, and the decision and judgment of the said Supreme Court for the County of Suffolk was affirmed, and the record and proceedings in said cause were remitted by the Court of Appeals to the Supreme Court of the State of New York, for the county of Suffolk.

Thereafter, and on the 4th day of May, 1910, an order was made and entered in said Supreme Court for Suffolk County, directing that the final order and judgment of the Court of Appeals be made the order and judgment of said Supreme Court of Suffolk County. Thereafter, and on the 9th day of June, 1910, judgment was entered in the office of the Clerk of Suffolk County, in accordance with said order of May 4th, 1910, in which final order and judgment, and the proceedings had prior thereunto in this case, certain errors were committed to the prejudice of the said plaintiff-in-error; all of which will more in detail appear in the Assignment of Errors which is filed with this Petition.

Wherefore, your Petitioner prays that a Writ of Error may issue in its behalf from the Supreme Court of the United States to the Supreme Court of the State of New York, for the correction of the errors and reversal of the judgment so complained of; that a transcript of the record proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States; that said Writ of Error operate as a supersedeas; that the amount of security which the plaintiff-in-error shall give and furnish on said Writ of Error may be fixed, and that upon the giving

153 of said security all further proceedings herein be suspended and stayed until the determination of said Writ of Error by the Supreme Court of the United States.

New York, October 17, 1910.

WING & RUSSELL,
Attorneys for Plaintiff.

HOWARD TAYLOR,
Of Counsel.

The Writ of Error as prayed for in the foregoing Petition is hereby allowed, and bond is fixed at the sum of Five Hundred Dollars.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

154 Supreme Court of the United States.

THE LEWIS BLUEPOINT OYSTER CULTIVATION COMPANY, Plaintiff-in-Error,
against
J. MARVIN BRIGGS, Defendant-in-Error.

Assignment of Errors.

Now comes the Lewis Bluepoint Oyster Cultivation Company, the above-named plaintiff-in-error, by Wing & Russell, its attorneys, and in connection with the Petition for a Writ of Error, filed herewith, says:—

That in the records and proceedings in this cause, and in the final order of the Supreme Court of the State of New York, in and for Suffolk County, entered therein on the 4th day of May, 1910, and the final judgment made and entered in said Court on the 9th day of June, 1910, on a remittitur from the Court of Appeals of the State of New York, there is manifest error in this, to-wit:—

I. Error in holding and deciding in said cause that the plaintiff-in-error was not entitled to an injunction restraining the defendant-in-error from digging or dredging in and upon the lands leased by and the property of the plaintiff-in-error, under the Waters of the Great South Bay.

155 II. Error in holding and deciding that the defendant-in-error could lawfully enter upon and dredge into the lands leased by and the property of the plaintiff-in-error, and in so dredging, remove and destroy the valuable oysters planted by and the property of the plaintiff-in-error, growing upon said lands, under and by virtue of the power of the Federal Government for the purpose of improving the navigability of the said waters, and that the United States Government in the exercise of that power, had the lawful right to so direct and contract for the dredging into and taking of the said lands and removal and destruction of the said valuable oysters of the plaintiff-in-error, without giving it just compensation therefor.

III. Error in holding and deciding that the plaintiff-in-error was not entitled as against the defendant-in-error, to the protection of the portion of the Federal Constitution, to-wit: Article V of the Amendments to the Constitution of the United States, which prohibits the taking of private property for public use without just compensation.

IV. Error in permitting the contractor for and agent of the United States to deprive the plaintiff-in-error of its property without due process of law, contrary to Article V of the Amendments to the Constitution of the United States, and error in deciding that the Supreme Court of the State of New York should not issue its

156 order of injunction against the defendant-in-error, and in dismissing the complaint of the plaintiff-in-error, and thus, in effect, depriving the plaintiff-in-error of its property, without due

process of law, contrary to Section I of Article XIV of the Amendments to the Constitution of the United States.

V. Error in holding and deciding that the United States and the defendant-in-error, acting under their authority, have a right, which is paramount to the rights of the plaintiff, and its lessors, to enter into and upon the lands and other property of the plaintiff and its lessons, under the waters of the Great South Bay, for the purposes of commerce and the improvement of navigation, without giving to the owners just compensation therefor.

VI. Error in holding and deciding that the United States and the defendant-in-error, acting under their authority, have a right, which is paramount to the rights of the plaintiff, and its lessors, to enter into and upon the fishing rights and lands of the plaintiff and its lessors, under the waters of the Great South Bay, for the purpose of commerce and the improvement of navigation, without giving to the plaintiff-in-error just compensation therefor.

Wherefore, The Lewis Bluepoint Oyster Cultivation Company, the plaintiff-in-error herein, prays that the judgment and order
157 of the Court of Appeals of the State of New York, and the judgment and order entered in the Supreme Court of the State of New York for the County of Suffolk, on the remittitur of said Court of Appeals of the State of New York, be reversed in accordance with the rights of the parties.

New York, October 17, 1910.

WING & RUSSELL,
Attorneys for The Lewis Bluepoint Oyster Cultivation Company, Plaintiff-in-Error.

HOWARD TAYLOR,
Of Counsel.

158 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Supreme Court of the State of New York, in and for the County of Suffolk, before you, or some of you, on a remittitur from the Court of Appeals of the State of New York, being the highest Court of law or equity of the said State, in which a decision could be had in the said suit between The Lewis Bluepoint Oyster Cultivation Company, plaintiff, and J. Marvin Briggs, defendant, wherein a title, right, privilege and immunity was claimed under the Constitution of the United States, and under the Statutes of the United States, and the decision was against the title, right, privilege and immunity so specially set up and claimed, a manifest error hath happened to the great damage of the said plaintiff as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do com-

mand you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have
159 the same in said Supreme Court at Washington, in the District of Columbia, within thirty days from the date hereof, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness, Honorable Edward D. White, Chief Justice of the United States the 29th day of March, in the year of our Lord, nineteen hundred and eleven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

160 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to J. Marvin Briggs, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden in the City of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court for the State of New York for the County of Suffolk, in an action wherein The Lewis Bluepoint Oyster Cultivation Company is plaintiff-in-error, and you are defendant-in-error, to show cause, if any there be, why the judgment rendered against the plaintiff-in-error, as in the said Writ of Error mentioned, should not be reversed and why speedy justice should not be done to the parties in that behalf.

Witness, Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States this 29th day of March, in the year of our Lord, one thousand nine hundred and eleven.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

Due service of the above citation admitted this 6th day of April, 1911.

WM. J. YOUNG,
U. S. Attorney &
Attorney for Defendant in Error.

161 [Endorsed:] Supreme Court of the United States. The Lewis Bluepoint Oyster Cultivation Company, Plaintiff-in-Error, against J. Marvin Briggs, Defendant-in-Error. Howard Taylor, of Counsel. Office & Post Office Address: 71 Broadway, Borough of Manhattan, New York City.

Know all men by these presents, That we, Lewis Blue Point Oyster Cultivation Company, as principal, and National Surety Company, as sureties, are held and firmly bound unto J. Marvin Briggs, in the full and just sum of Five Hundred (500) dollars to be paid to the said J. Marvin Briggs, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of March, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a term of the Supreme Court of the State of New York, in a suit depending in said Court, between Lewis Bluepoint Oyster Cultivation Company, Plaintiff, and J. Marvin Briggs, defendant, a judgment was rendered on a remittitur from the Court of Appeals of the State of New York, against the said Lewis Bluepoint Oyster Cultivation Company, plaintiff, in favor of the said J. Marvin Briggs, defendant, and the said plaintiff, Lewis Bluepoint Oyster Cultivation Company, having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said J. Marvin Briggs, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said Lewis Bluepoint Oyster Cultivation Company shall prosecute said Writ of Error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void;
163 else to remain in full force and virtue.

LEWIS BLUE POINT OYSTER CULTIVATION CO., [SEAL.]
By WING & RUSSELL, [SEAL.]
Its Attorneys.
NATIONAL SURETY COMPANY, [SEAL.]
By WM. A. THOMPSON,
Resident Vice-President.
M. W. GEWECKE,
Res. Assistant Treasurer.

Sealed and delivered in presence of
BURT D. WHEDON,
As to Lewis B. P. O. C. Co.

Attest:
——— ———.

Approved by
CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

164 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 20th day of March, one thousand nine hundred and eleven, before me personally came Wm. A. Thompson, known to me to be the Res. Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of Lewis Blue Point Oyster Cultivation Co., as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Res. Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company, is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894, that the seal affixed to the within Bond of Lewis Bluepoint Oyster Cultivation Company is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Res. Vice-President of said Company, and that he is acquainted with M. W. Gewecke, and knows him to be the Res. Assistant Secretary of said Company; and that the signature of said M. W. Gewecke, subscribed to said bond is in the genuine handwriting of said M. W. Gewecke, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and
165 liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Two million dollars.

That —— is our agent to acknowledge service in the Judicial District wherein this bond is given.

WM. A. THOMPSON.
(Deponent's signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 20th day of March, 1911.

WM. F. GAYNOR,
Notary Public, No. 53, for County of Kings.
(Officer's signature, description and seal.)

Certificate filed in New York, Queens, Richmond & Westchester Counties.
Kings County Register's Office No. 4017.
New York County Register's Office No. 2149.

Endorsed: Filed April 13, 1911, @ 12 M. W. F. F., Clerk.

STATE OF NEW YORK,
County of Suffolk, ss:

I, William F. Flanagan, Clerk of the County of Suffolk, and Clerk of the Supreme Court of the State of New York, in and for said County (said Court being a Court of record) do hereby certify that I have compared the annexed copy Bond, in the matter of the Lewis Bluepoint Oyster Cultivation Company vs. J. Marvin Briggs, with original Bond filed in this office April 13, 1911, and that it is a just and true copy of such original and of the whole thereof.

In Testimony Whereof I have hereunto set my hand and affixed the Seal of said County and Court this 13" day of April, 1911.

[SEAL.] WM. F. FLANAGAN, *Clerk.*

166 [Endorsed:] Supreme Court of the United States. The Lewis Bluepoint Oyster Cultivation Company, Plaintiff-in-error, against J. Marvin Briggs, Defendant-in-error. Bond. Wing & Russell, Attorneys for Plaintiff. Office and P. O. Address, 37 Wall Street, Borough of Manhattan, New York City. Howard Taylor, of Counsel.

167 At a Special Term of the Supreme Court held in and for the County of Kings at the Court House therein, on the 4th day of May, 1910.

Present: Hon. Abel E. Blackmar, Justice.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, Plaintiff,
against
J. MARVIN BRIGGS, Defendant.

An appeal having been taken in this action by the plaintiff to the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court, Second Judicial Department, entered in the office of the Clerk of the County of Suffolk on the 13th day of January, 1909, which affirmed the judgment of the Supreme Court, Suffolk County, in favor of the defendant against the plaintiff dismissing the complaint herein upon the merits and dissolving the injunction granted herein, which last named judgment was entered in the office of the Clerk of the County of Suffolk on the 25th day of February, 1908, and said judgment of the Appellate Division having been affirmed with costs by the Court of Appeals as appears by the remittitur herein sent down from the Court of Appeals and now filed in this Court.

Now, upon said remittitur of the Court of Appeals, upon motion of William J. Youngs, United States Attorney and Attorney for the defendant, it is

Ordered and adjudged that the judgment of the said Court of Appeals herein be and the same is, hereby made the judg-
168 ment of this Court, and that the Clerk of the County of Suffolk enter a judgment herein, adjudging the said judgment of the Court of Appeals to be the judgment of this Court and

awarding the defendant his costs upon the appeal to the Court of Appeals, to be duly taxed according to law.

Enter in Suffolk County.

A. E. B., *J. S. C.*

Granted May 4, 1910.
HENRY P. MOLLOY, *Clerk.*

Endorsed: Filed June 9, 1910 @ 12 M. W. F. F., Clerk.

169 At a Special Term of the Supreme Court held in and for the County of Kings at the County Court House in the Borough of Brooklyn in said County on the 12th day of July, 1910.

Present: Hon. Isaac M. Kapper, Justice.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, Plaintiff,
against
J. MARVIN BRIGGS, Defendant.

On reading and filing the annexed consent of Asa A. Spear and Charles H. Huntoon, Jr. as Secretary of The Lewis Blue Point Oyster Cultivation Company and on motion of Wing & Russel for the plaintiff herein

Ordered that Wing & Russell of 37 Wall Street, Borough of Manhattan, New York City, be and they are hereby substituted as the attorney- of the plaintiff in the above entitled cause in place of the said Asa A. Spear and that this order be entered in the office of the Clerk of Suffolk County.

Enter.

I. M. K., *J. S. C.*

Enter in Suffolk County.

Granted Jul- 13, 1910.
HENRY P. MOLLOY, *Clerk.*

170 New York Supreme Court, Suffolk County.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, Plaintiff,
against
J. MARVIN BRIGGS, Defendant.

It is hereby stipulated and agreed that Messrs. Wing & Russell be substituted as Attorneys for the plaintiff in the above entitled action, in the place and stead of Asa A. Spear, and that an order be entered accordingly on this stipulation, without notice.

Dated July 8th, 1910.

ASA A. SPEAR, *Pl'ff's Att'y.*
THE LEWIS BLUE POINT OYSTER
CULTIVATION COMPANY.
CHARLES H. HUNTOON, JR.,
Secretary.

COUNTY OF SUFFOLK, *ss:*

On this 9" day of July, 1910, before me personally came and appeared Charles H. Huntoon, Jr., the Secretary of The Lewis Blue Point Oyster Cultivation Company, the plaintiff above named, to me known and known to me to be the Secretary of said Corporation, executing the foregoing consent and he duly acknowledged to me that he signed and executed the said consent as the act and deed of said corporation.

[L. S.] ALFRED C. EDWARDS,
Notary Public, Suffolk County, N. Y.

Endorsed: Filed July 14, 1910, 10 a. m. W. F. F., Clerk.

171 New York Supreme Court, Suffolk County.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, Plaintiff,
against
J. MARVIN BRIGGS, Defendant.

Judgment.

JUNE 9, 1910, @ 12 M.

An appeal having been taken by the plaintiff to the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court, Second Judicial Department, heretofore entered in the office of the Clerk of the County of Suffolk on the 13th day of January 1909, which affirmed with seventy eight and 50/100 dollars ($78.50) costs, a judgment of the Supreme Court of Suffolk County, in favor of the defendant dismissing the complaint herein upon the merits and dissolving the injunction granted herein, which last named judgment was entered in the office of the Clerk of the County of Suffolk on the 25th day of February 1908 and said judgment of the Appellate Division having been affirmed with costs by the Court of Appeals, as appears by the remittitur herein sent down from the Court of Appeals and now on file in this Court and this Court having, by an order entered herein on the 3rd day of May 1910 ordered that said judgment of the Court of Appeals be made the judgment of this Court.

Now upon motion of William J. Youngs, United States Attorney and Attorney for the defendant, it is

Adjudged that the said judgment of the Court of Appeals be and the same is, hereby made the judgment of this Court and it is

172 Further adjudged that the defendant recover from the plaintiff, the sum of $127 25/100 dollars as costs herein upon appeal to the Court of Appeals and that he have execution therefor.

Dated June 9, 1910.

WM. F. FLANAGAN, *Clerk.*

Endorsed: Filed June 9, 1910 @ 12 M. W. F. F., Clerk.

173 Supreme Court of the State of New York, County of Suffolk.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, Plaintiff,
against
J. MARVIN BRIGGS, Defendant.

STATE OF NEW YORK,
County of Suffolk, ss:

I, Wm. F. Flanagan, Clerk of the County of Suffolk and Clerk of the Supreme Court of the State of New York in and for the County of Suffolk, do hereby certify that the annexed record of papers on appeal to the Court of Appeals of said State, remittitur issued by and from said Court of Appeals and Opinion of the Court of Appeals, the order of the Supreme Court pursuant to said remittitur, and the judgment in pursuance of said order thereon, are the originals thereof entered and filed in this office; that attached thereto are the writ of error with allowance thereon, the petition for said writ, with allowance thereof and fixing the amount of security therefor made thereon, the citation with acceptance of service thereof, and the assignment of errors and prayer for reversal; and the same are the originals thereof; and a copy of the bond on writ of error, together with the approval thereof, which I have compared with the original thereof on file in this office, and find the
174 same to be a true copy of the whole thereof.

In witness whereof I have hereunto set my hand and affixed my official seal this 14th day of April, 1911.

[SEAL.]

WM. F. FLANAGAN,
Clerk of Suffolk County and of the Supreme Court of the State of New York in and for the County of Suffolk.

Endorsed on cover: File No. 22,639. New York Supreme Court. Term No. 576. The Lewis Blue Point Oyster Cultivation Company, plaintiff in error, vs. J. Marvin Briggs. Filed April 26th, 1911. File No. 22,639.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, plaintiff in error,
v.
J. MARVIN BRIGGS.

No. 1018.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

MOTION TO ADVANCE.

Comes now the Solicitor General, on behalf of J. Marvin Briggs, the defendant in error, and moves the court to advance the above-entitled cause and set it down for hearing during the October term, 1911.

This writ of error was issued to the Supreme Court of the State of New York after a decision by the Court of Appeals of the State of New York (reported in 198 N. Y., 287) affirming the judgments of the courts below in dismissing the complaint of the plaintiff oyster company, plaintiff in error here. The defendant, Briggs, pursuant to a contract made with the United States Government, was engaged in dredging, so as to deepen a channel in the Great

South Bay on the Long Island coast. In the course of his work he entered upon submerged lands owned by the plaintiff in error (as lessee) under title derived from English Crown grants, which lands were being used by the plaintiff in error for the development of oyster beds, and destroyed oysters planted thereon. The plaintiff in error sought an injunction restraining trespass upon these lands, and has been defeated in the State courts upon the ground that the plaintiff's ownership and rights were subservient to the rights of Congress to regulate commerce and navigation. The plaintiff in error claims that it has been denied a right or privilege granted it under the Constitution of the United States, to wit, that its property should not be taken without just compensation, and that the taking of its property in this instance, without giving it due compensation, has been the taking of property without due process of law.

The fundamental question in the case is whether an owner of submerged lands and of oysters planted thereon is entitled to compensation for the entry upon his lands and the destruction of his oysters through the acts of a contractor engaged in improving navigation, by deepening a channel, under contract with the United States Government.

The questions involved are of great public importance, as the oyster industry is a large one and its operations are carried on in many of the bays and harbors throughout the country where the Govern-

ment's dredging operations are in progress for the improvement of navigation. The correlative rights and duties of the owners of these submerged lands and oyster beds and of the Government's contractors ought to be settled at as early a date as possible.

This motion is made with the concurrence of counsel for the plaintiff in error.

FREDERICK W. LEHMANN,
Solicitor General.

MAY, 1911.

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[redacted]

Supreme Court of the United States

October Term, 1915

No. 77

THE LEWIS BLUEPOINT OYSTER CULTIVATION COMPANY

v.

J. MARVIN BRIGGS

Error to the Court of Appeals of the State of New York

BRIEF FOR PLAINTIFF IN ERROR

HOWARD TAYLOR

Of Counsel for Plaintiff in Error

KING & RUSSELL

Attorneys for Plaintiff in Error

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Supreme Court of the United States.

THE LEWIS BLUEPOINT OYSTER CULTIVATION COMPANY,
Plaintiff-in-Error,

against

J. MARVIN BRIGGS,
Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR.

Statement of the Case.

This case comes before the Supreme Court upon a writ of error (p. 86 of the Record), allowed by Mr. Justice Hughes, to review a final judgment of the Supreme Court of the State of New York entered upon a remittitur from the Court of Appeals of that State.

The plaintiff-in-error here was the plaintiff below, and brought this suit to enjoin the defendant, a contractor engaged, under a contract with the United States Government, in dredging in the Great South Bay on Long Island. The injunction sought was against entering upon the plaintiff's lands (under water), and removing the soil and plaintiff's oysters therefrom (Complaint, p. 2). The defendant, Mr. Briggs,

in answer (p. 5), sought to justify his course in the light of the facts that his acts were committed in the performance of the contract that he had made with the United States Government, and that that contract was in the furtherance of an improvement to navigation. The plaintiff has taken the position, from the outset of the case, that its property could not be thus invaded and taken without giving the plaintiff just compensation therefor, and that to have done so was to have deprived the plaintiff of its property without due process of law.

The Courts of New York State, in substance and effect, held that plaintiff's lands under water, and the oysters thereon, might be confiscated by a contractor working for the United States Government, on the ground that all such property must be deemed to be owned subject to the power of the Government to invade and destroy the same, without requirement of any compensation, provided only that it were done in furtherance of an improvement to navigation. Therefore plaintiff's complaint was dismissed (Judgment, p. 16). Opinions were written in all of the courts, which will be found in the record, at p. 67 (that of the Special Term, Justice Jaycox); at p. 72 (that of the Appellate Division, by Justice Gaynor); and at p. 77 (that of the Court of Appeals, by Judge Vann).

The Facts in the Case.

There is no dispute in this case about the facts upon any point, major or minor. They were placed before the Court by a stipulation as to the facts, which will be

found at page 19 of the record. That stipulation, and the schedule of exhibits annexed thereto, comprise the case which was before the courts below (pp. 19–66 of the Record), and which resulted in the findings of fact made by the trial Court and appearing at pages 12–18 of the record.

The Great South Bay is a body of water on the South side of Long Island in the State of New York, land-locked on all sides except for one or two narrow inlets, the best known of which is Fire Island Inlet. It is navigable, though shoal, the central basin being of a depth of from six to ten feet at low water (see p. 29 and *People ex rel. Howell* vs. *Jessup*, 160 N. Y., at p. 251).

The Smith family—to whose rights the plaintiff-in-error has succeeded by virtue of a lease from them of the lands in question (Findings of Fact Fifth and Sixth, p. 13; Stipulations (3) and (4), p. 20, and Leases, pp. 63 to 67)—have owned a large portion of the Great South Bay for more than two hundred years. Colonel William Smith was the Chief Justice of the Province of New York, and

> " WHEREAS, our loving subject, the sd Coll. Willm. Smith, one of ye members of our Councill and Chiefe Justice of our sd Province of New Yorke and territorys depending thereon in America, hath not only been at great charge and expence in the purchasing of all the sd necks and tracks of land and meadow, beach, bay and islands upon the south syde of our sd island of Nassau, within ye limitts and bounds aforesaid, but also hath been at much more considerable charge and expence in ye purchasing and improvement of a certain neck or peninsula of upland and meadow and thatch beds on creek thatch, within the

limitts and bounds of ye towne of Brookhaven, and lying and being situate on ye north syde of ye island of Nassau aforesaid " (Record, p. 44),

therefore, (p. 43) :

" William and Mary, by the Grace of God, King and Queen of England, Scotland, ffrance and Ireland, Defenders of the faith, &c,"

granted unto the Chief Justice and his heirs and assigns:

" All and every the forerecited necks, tracts and parcells of *Land* and meadow within the respective limitts and bounds before menconed and expressed, together with all and every of the messuages, tenements, buildings, barnes, houses, outhouses, fences, orchards, Guardings, Pastures, meadows, *marshes*, swamps, pooles, poundes, *waters*, *water courses*, woods, underwoods, trees, timber, quarryes, Rivers, Runs, Rivoletts, Brooks, *Lakes*, *Streames*, Creeks, Harbours, *beaches*, *bays* inland fferyes, ffishing, ffowling, hunting, hawking, mines, mineralls (silver and Gold mines only excepted), and all the rights, members, Libertyes, priveiledges, Jurisdictions, Royaltyes, Hereditaments, proffits, benefits, advantages and appurtenances whatsoever, to the aforesd, severall and respective necks and tracts and parcells of Land and meadow, *Bay*, *Beach and Inlands* with in the sd bay, belonging or in any ways appertaining, or accepted, reputed, taken, known or occupyed as part, parcell or member thereof " (p. 45, italics being ours).

Col. William Smith left his property so acquired to his son, William Smith, in 1704 (p. 47). That son, dying in 1742, left his property to his son, William Smith. Meanwhile there had been two other grants from the Crown of England of portions of the Great South Bay,

the same being to the Freeholders and inhabitants of the town of Brookhaven. (These will be found at pages 37 to 42 of the Record.) The town of Brookhaven also took the precaution to have a confirmatory deed from the Indians (p. 42). In 1767 William Smith (the 3d) and the town of Brookhaven in order, we presume, to clear up questions of title, interchanged deeds by which he and the town of Brookhaven became tenants in common of the whole property, whether conveyed to the original Colonel Smith or to the town of Brookhaven (p. 47). Thereupon succeeded further William Smiths on through the balance of the eighteenth century and down to a Robert Smith who died intestate in 1885, leaving surviving his children who have made the leases in question to the present plaintiff-in-error (p. 48).

The title of the Smith family and the town of Brookhaven to all those parts of the Great South Bay which they owned in common was examined in great detail, and adjudicated as good, by the Court of Appeals of the State of New York in the case of *Trustees of Brookhaven et al.* vs. *Strong*, 60 N. Y., 56. And it is of interest to observe that in a similar case of a Long Island title to lands under water, the Supreme Court of the United States in *Lowndes* vs. *Huntington*, 153 U. S., 1, upheld the title under one of these Crown grants.

After the decision in the *Strong* case in 60 N. Y., the town of Brookhaven and the Smith family brought a friendly suit in partition which occupied some ten years, and the findings and judgment in which appear at pages 49 to 63 of the Record. By the interlocutory

judgment in that suit it was adjudged that the two were tenants in common of

> "All that part of the Great South Bay or lands covered with water and the islands in said Bay, situate, lying and being" et cetera, et cetera "with all and every the beaches bays, islands, fishing, fowling, hunting, hawking and all the rights, members, liberties, privileges, jurisdictions, royalties, hereditaments, profits and appurtenances whatsoever thereunto belonging or in any way appertaining; that they are seized and possessed of the bed of the Bay, the water and islands therein" (see p. 51).

Thereupon, by the final judgment, the two, like Abraham and Lot, divided their possessions, the Smith family taking that part of the Great South Bay that lay to the westward of a certain imaginary line drawn across it, and the town of Brookhaven taking the eastward (see p. 62). The lease in question is of a part of the property that was thus apportioned to the Smiths.

By the Stipulation of the parties, and the Findings of Fact in the case, it is conceded that the Smiths were the "owners in fee simple of a tract of land under the waters of the Great South Bay" (Finding Second), which they leased as aforesaid to the plaintiff-in-error herein. We refer the Court especially to the Eighteenth Finding of Fact, summarizing the title of the Smith family.

In the year 1900 Senator Root, when Secretary of War, transmitted to Congress the project of the Engineer's Office of the United States Army to secure a channel in the Great South Bay to a

depth of ten feet mean low water from Fire Island Inlet to the center basin of the Great South Bay and of eight feet into the Patchogue River. The correspondence appears at pages of the record, 27 to 33, the description of the areas to be dredged being given on page 33. This resulted eventually in a contract between the United States, through the Colonel of the Corps of Engineers, and Mr. J. Marvin Briggs, the defendant-in-error, to do the dredging of the channel at the sum of $.35 per cubic yard for the soil extracted from the Bay. (See Contract, p. 23).

There will be no question of the plaintiff's strenuous protest to the Government against the contemplated action of the Government pursuant to this contract, and of the efforts on the part of the plaintiff to cooperate with the Government in such a way as to avoid loss to the plaintiff—efforts which seem to have met with no response whatever so far as the record shows. (See Plaintiff's Letters C and D at pages 34 and 35 of the record, and also plaintiff's letter of protest after the letting of the contract but made prior to the doing of the work, at page 36 of the Record).

Such being the rights of the respective parties, the things that actually took place are set forth in the Stipulation as to the facts (p. 19) and appear in the following Findings (p. 13) by the Court :

> "*Eighth.*—That under the aforesaid leases the plaintiff entered into possession of the said lands under water, and staked and buoyed the same, and planted oysters thereon, expending in the said work

a large sum of money; and that at the present time there are planted and growing upon said lands a large quantity of oysters, many of them ready for market and worth a considerable sum of money.

Ninth.—That the oysters are the private property of the plaintiff, and the lands are valuable for the cultivation of oysters.

Tenth.—That the defendant has been dredging in the Great South Bay with a steam dredge under and by virtue of a contract entered into between the government of the United States and the defendant, which said contract is dated May 21, 1906, and was made and executed by W. R. Livermore, the engineer in charge of said work, and before being restrained by this Court was about *to dredge a channel increasing the depth of water from its present depth to the depth of ten feet over a surface two hundred feet broad and about two thousand feet long diagonally through the above-mentioned lands,* and which said contract was made and entered into between the United States of America and said defendant under and by virtue of the laws of the United States of America, known as the River and Harbor Act of June 16, 1902, which said law was passed by reason of a communication made by the Hon. Elihu Root, Secretary of War, to the Speaker of the House of Representatives, Fifty-sixth Congress, Second Session.

Eleventh.—That prior to the time the defendant began to dig said channel, as hereinbefore found, the plaintiff notified him to desist therefrom, and that he refused to do so, unless stopped by the Court.

Twelfth.—That the digging of the said channel would destroy a large number of oysters on the lands aforesaid and would kill oysters of considerable value already planted upon the said lands, both along the line of said excavation and for a long distance on either side thereof.

Fourteenth.—That the oysters planted upon the said lands under water would not exceed in value the sum of five thousand dollars.

Fifteenth.—That the digging of the said channel through the said land would very materially reduce its value for oyster cultivation.

Sixteenth.—That Bar B, described in the defendant's contract and shown on Exhibit H, is embraced in the aforesaid leases, and that *the channel which the United States Government has contracted with the defendant to cut would have cut diagonally through the premises described in said leases* " (italics are ours).

It was also conceded between the parties, and found as a fact, that neither the contractor nor the United States had acquired any right of entry from the Smith family or the plaintiff, through condemnation proceedings or otherwise, and that they had full notice of the plaintiff's rights ; also that unless the United States or its contractor had a right to enter upon plaintiff's lands under water without giving the plaintiff any compensation, this action was the appropriate form of redress for the plaintiff (see Findings of Fact Nineteenth and Twentieth).

The Trial Court found as Conclusions of Law (p. 15) that the plaintiff had the title to the soil in the Great South Bay (and also an exclusive private right of fishery), and was entitled to exclusive possession, use and occupation of those portions of the Great South Bay—subject, however, to the right of the United States to enter upon the

" lands under water mentioned in the amended complaint herein, for the purposes of commerce and

the improvement of navigation, without compensation to the owners thereof or their lessee, the plaintiff herein."

These findings were reiterated in the disposition made by the Court of the plaintiff's requests to find, appearing at page 17 of the record.

The plaintiff's exceptions are at page 18 of the record.

It may be noted in passing that the findings speak of an injunction granted by the Court which had interfered with the action of Mr. Briggs up to the trial of the case. This was evidently a temporary injunction, and was dissolved by the final judgment, as appears at page 16 of the record.

Summarily speaking, there is here presented an instance where a private party has a clear exclusive title to lands under water, and an exclusive title, so far as it can in the nature of things be exclusive, to the waters on the said lands. There is also a case where the Government's contractor proposes beyond question to *take* this property, as the findings are express upon the point that the action of the contractor would cut in and through the premises described in the leases, and also, of course, would destroy the plaintiff's oysters of a large amount of value. In other words, there is no question as to the fact that the lands and oysters are plaintiff's property, and as to the fact that they were being taken, and as to the fact that this was being done by a contractor acting for and in behalf of the United States Government.

Specification of the Errors relied upon.

The Assignments of Errors (p. 85) are six, and reiterate with perhaps unnecessary prolixity the one fundamental error assigned. That error is that the Courts below have decided that a contractor for the United States Government may take property belonging to the plaintiff, consisting of lands under water and the oysters thereon, without giving the plaintiff just compensation therefor, and may do this by reason of the power of the Federal Government to improve navigation. The plaintiff-in-error assigns the following two errors to this conclusion of the Courts below, first, that plaintiff's private property is being taken for public use without just compensation, contrary to the provisions of the Fifth Amendment to the Constitution, and, second, that plaintiff, therefore, has thus been deprived of its property without due process of law, contrary to the provisions of the same amendment to the Constitution, as well as Amendment Fourteen, Section 1.

BRIEF OF THE ARGUMENT.

I.

Upon reason and authority the plaintiff-in-error had a clear case, and right to the relief sought below.

It would seem, but for the fact that the decisions below were against the plaintiff-in-error, that a mere statement of the proposition for which this Oyster Com-

pany stands, should suffice without further argument. The power of Congress to regulate commerce, and incidentally navigation, goes hand in hand with the other powers of and limitations upon the Government set forth in the Constitution, and is obviously to be exercised in conformity to such limitations.

This Court has so decided in *Monongahela Navigation Co.* vs. *United States*, 148 U. S., 312, see page 336; *United States* vs. *Lynah*, 188 U. S., 445, see page 471.

The right of compensation to the owner of private property when it has been taken for public use, is a fundamental inherent right which, under the decisions of the Courts, exists even independently of the National or State Constitutions, and has merely been declared therein.

> *Sinnickson* vs. *Johnson*, 17 N. J. L. (2 Harr), 129, 145, cited in the *Monongahela* case (p. 324).

There has been laid down no exception to this right because the property taken was growing oysters. The growing of oysters is a legitimate industry. The oysters here in question were being grown upon the lands of the plaintiff, and, of course, upon the only kind of lands (submerged ones), where the product of that industry could grow. Surely no logical reason can be advanced why the product of that industry should any more be subject to confiscation by the National Government in pursuing the development of commerce, than the crops of the fields or the buildings in the great cities. The Constitutional protection is clear. The facts below bring out a call for its ex-

ercise, beyond dispute as to what the evidence is, beyond dispute as to the fact that the property in question belonged to the plaintiff, beyond dispute as to the fact that the property in question was being taken, and beyond dispute as to the fact that it was being taken by a contractor for the Government, whose only claim of authority was of one conferred upon him by the United States.

What more should there be to say?

So far as there have been decisions upon this question, they have been, until this present case, in favor of the plaintiff-in-error's claim.

In *Brown* vs. *United States*, decided by Circuit Judge Simonton in 1897, and reported in 81 Fed. Rep., 55, the petitioners were lessees of certain ground under water in the York River, which they were using for planting and propagating oysters. The agents of the United States engaged in improving the York River in aid of commerce under acts of Congress in that behalf

> "cut a wide and deep trench through the oyster beds of the petitioners, and, besides this, deposited upon them great quantities of mud and other material dredged from the channel of the said river, in the lawful prosecution of said improvement, thus destroying about 30,000 bushels of oysters which petitioners had planted; that besides this, in the further prosecution of this work, the agents of the government, under these Acts of Congress, constructed a high and substantial wooden dike on the oyster beds of the petitioners, extending their entire length, for the purpose of diverting the current of the river and maintaining the channel, the effect of which was to destroy the value of the property of the petitioners for the purposes for which it was obtained."

Thereupon the petitioners prayed for compensation for their property taken, to which prayer the United States demurred.

The Court points out that :

> " The demurrer admits that the petitioners are the owners of these beds under the statute of Virginia, and that they were in actual possession of them, planting oysters thereon. It also admits that the United States have set up no adverse title to the beds; on the contrary, that they recognized the ownership of the petitioners therein."

In other words, the situation was precisely analogous to what it is in the case at bar. Judge Simonton in the first paragraph of the opinion, after stating the facts, deals with the right of the petitioners to bring their proceeding in the particular way they did, and holds that they were within their rights. Then he goes on to a discussion of the merits, to which we commend the attention of this Court. The learned Judge says :

> " Nor is this case one for consequential damage upon property not actually taken by the government, as in *Gibson* vs. *U. S.*, 17 Sup. Ct., 578. The land claimed by the petitioners was actually taken, and itself has been used by the government. We have a case, therefore, of submerged land in the use and possession of the petitioners, which has been taken by the government for the purpose of improving the navigation of the river in whose bed the lands are. Must the government compensate the owner for this taking? Did he hold the lands subject to a servitude in respect to navigation created in favor of the federal government by the constitution? Did this servitude go to the extent claimed in the defense to this action?

The navigable waters of the United States are within their jurisdiction and under their control. Congress can determine what are obstructions to navigation (*Pennsylvania* vs. *Wheeling, etc., Bridge Co.*, 18 How., 421). The maritime jurisdiction of the United States courts extends to all public navigable waters (*The Genesee Chief*, 12 How., 443); that is to say, all waters which are or can be highways of commerce, between the states or with foreign countries (*The Montello*, 11 Wall., 411; *Miller* vs. *Mayor, etc., of New York*, 109 U. S., 385, 3 Sup. Ct. 228). But although the United States have jurisdiction over the navigable streams as highways, the beds of the streams are the property of the state wherein they lie, or of persons to whom the state has granted them (*Knight* vs. *Association*, 142 U. S., 183, 12 Sup. Ct., 258). As the United States have control over their navigability—that is to say, to their use as highways—neither the state or any grantee of the state can erect in navigable streams structures which may obstruct or impede their use as highways (*Shively* vs. *Bowlby*, 152 U. S., 1, 14 Sup. Ct., 548). And, so long as the land is not used for the erection of structures impeding or obstructing navigation, the rights of the land-owner cannot be disturbed. The control of the government over the navigable streams gives it the right to improve or protect the navigation of such streams by deepening the channels or by erecting lighthouses (*South Carolina* vs. *Georgia*, 93 U. S., 4). And if, in doing this, incidental injury is done to property below or above the works used for improving the channel, this incidental injury gives no claim for compensation against the United States (*Gibson* vs. *U. S., supra*). But when the government, for the purpose of adding to the navigability of a stream, changes its natural channel, and, in doing so, occupies and assumes exclusive possession of the land of

a citizen, it takes private property for a public use, and must compensate the owner for the value of the property thus taken from him. The idea of a servitude is that it must be enjoyed in common with the owner of the servient tenement. The existence of the latter is essential to the co-existence of the former. When they both become vested in the same person, the dominant tenement becomes extinguished. But when the possessor of the dominant tenement ousts the owner of the servient tenement, and himself assumes exclusive use and enjoyment of the land, which was subject to the servitude, the servitude is extinguished. See Gould, Waters, § 313, and cases cited. The demurrer is overruled."

Again in *Richardson* vs. *United States*, 100 Fed. Rep., 714, the Court, although deciding for the Government upon the facts in that case, reiterates the views theretofore expressed and in terse language points out the distinguishing features:

"With regard to the oysters and oyster plant which were injured by the results of the dredging operation; the injury was caused, not by any invasion of the territory on which the oysters were planted, or where the oyster plant was situated. The dredging of the river above this locality stirred the mud, and, as an incidental result thereof, the injury was effected. When private property is taken for public use, the government must make compensation, and it is not necessary to the taking that the property be actually converted to the public use. It is enough if its value be destroyed or permanently injured (*Pumpelly* vs. *Canal Co.*, 13 Wall., 166; 2 L. Ed., 557). But in such case the injury must be direct and not consequential (*Zimmerman* vs. *Canal Co.*, 1 Watts & S., 346). Especially is this the law with regard to property on navigable streams. It is

true that the beds of navigable streams are the property of the State. And it is also true that the State can grant the use of such beds to private citizens (*Knight* vs. *Association*, 142 U. S., 183; 12 Sup. Ct., 258; 35 L. Ed., 974; Gould, Waters, §34, and cases quoted). But the State holds these beds in trust for the public for the purposes of commerce and navigation, and subject to these purposes; and the Constitution has given Congress sole control over navigation and commerce. So the persons who hold under the State are affected with the same trusts. Therefore riparian ownership on navigable waters is subject to the obligation to suffer the consequences of the improvement of the navigation under an act of congress passed in the exercise of the dominant right of the government in that regard, and damages resulting from the prosecution of such an improvement cannot be recovered in the court of claims (*Gibson* vs. *U. S.*, 166 U. S., 269; 17 Sup. Ct., 578; 21 L. Ed., 996). Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, although their consequences may impair its use, are not a taking within the meaning of the constitutional provision which forbids the taking of such property for public use without just compensation therefor (*Transportation Co.* vs. *City of Chicago*, 99 U. S., 535; 25 L. Ed., 336)."

In the above two cases decided by Judge Simonton, it will be observed that the owners of the oyster beds permitted the entry of the Government's officials and confined their claim to a direct proceeding to recover compensation, while in the case at bar the plaintiff-in-error has sought to enjoin this entry until the Government should take proceedings for the condemnation of the plaintiff's

property. In this alternate procedure the plaintiff-in-error was clearly within its rights. It was conceded by the stipulation, and found by the Court, that the plaintiff was pursuing the correct remedy to enforce its legal claim if it were right in its contentions as to the law. The parties stipulated that "if the Court should decide that the United States has no such paramount right, then it is conceded that this is a proper action in equity for an injunction" (p. 23). The twentieth finding held that "this is a proper action in equity for an injunction unless the United States * * * has a right to enter into and upon the said lands under water * * * without compensation to the plaintiff."

In *Philadelphia Company* vs. *Stimson, Secretary of War* (223 U. S., 605), this Court, in a suit of an analogous nature, upholds the correctness of the remedy by injunction (see pp. 620-622 of the opinion).

Pomeroy's Equity Jurisprudence, Vol. V, being Equitable Remedies, Vol. I, at §§ 493 and 499, lays down similar rules.

Naturally, a reversal of the judgments below would not now be adequate if it were merely to be accompanied with a direction to award the injunction demanded. Presumably upon the adjudication below in favor of the defendant (in February, 1908), the defendant long since entered upon the plaintiff's lands and destroyed the plaintiff's oysters. Therefore, upon a reversal at this present date there would have to be some further hearing before a court, or a master or referee, to ascertain the present situation, and thereupon to administer the appropriate remedies for the in-

vasion and appropriation by the defendant of the plaintiff s rights and titles.

In brief, plaintiff's constitutional right is plain ; the call for its exercise in this instance is equally plain ; and the correct remedy has been pursued.

There would be slight occasion for further argument except for the adverse decisions below ; but on account of those adverse decisions counsel for plaintiff-in-error feels constrained to go into the matter much more at length, by way of answer to the opinions in the State courts.

II.

The Courts below have, we respectfully submit, misconceived the decisions of the Federal Courts, the Federal cases cited affording no basis for the adjudication in this case.

No attention was given below to the decisions of Judge Simonton, which were directly in point, evidently because those decisions escaped the notice of counsel below as well as the Court. Also, the Courts below paid no attention to the opinion of Attorney-General Bonaparte, given under date of October 25, 1907, some few months prior to the decision by the Special Term of the case at bar (see Opinions of Attorney-Generals, Vol. 26, p. 441). Mr. Bonaparte advised the Secretary of War, in an analogous case, that the Government was liable for just compensation for the destruction of oysters. His decision was based upon the decision of

this Court in the *Monongahela* case cited in our prior point, and *Pumpelly* vs. *Green Bay Company* (13 Wallace, 166).

Then, by way of bad luck for this plaintiff-in-error, after this case had been decided below, overlooking these direct authorities in favor of the contention of the Oyster Company, the fact that this particular case *had* been decided against the Oyster Company was brought to the attention of Attorney-General Wickersham by the Secretary of War ; and thereupon Attorney-General Wickersham, largely upon the strength of this very case which is now before this Court for consideration, gave a reverse opinion from that of his predecessor (Opinions of Attorney-Generals, Vol. 27, p. 311).

Judge Vann, in writing the opinion for the Court of Appeals below, relied with the greatest emphasis upon the decision in the case of *Scranton* vs. *Wheeler* (179 U. S., 141), putting that case as substantially controlling for the case at bar. This, we respectfully submit, was a most total misconception of the action of this Court in *Scranton* vs. *Wheeler*. The question before the Court in that case was as to the right of the Government to deprive a riparian owner of his right of *access* to navigable waters, or to diminish the facility of his right of access to navigable waters, without making him compensation, when that was done in aid of an improvement to navigation. The opinion of the Court was to the point that such a deprivation was not a "*taking*" of property within the meaning of the constitutional provision. But this question there debated cannot be debated in the case at bar, because, as we have hereto-

fore pointed out, all sides have conceded that plaintiff's property in this case was to be "*taken.*" The cutting of the channel goes right through plaintiff's lands and destroys the oysters thereon.

Indeed, there was a dictum by three distinguished members of this Court (Justice Shiras, Justice Gray and Justice Peckham) to the effect that when the question should arise which is now before this Court in the case at bar, they would be of the opinion that our contention should be sustained. In commenting upon the breadth of the language of the prevailing opinion in that case delivered by Justice Harlan (and in the result alone of which Justice Brewer concurred), Justice Shiras, speaking for himself and the other two dissenting Justices, says (p. 169):

> "It is, I think, impossible to read this language, particularly when read in connection with other passages in the opinion, without understanding it to assert that where the riparian owner has a title to lands under navigable waters adjacent to his upland, such land may be taken into the exclusive possession of the Government by the erection of a public work without compensation; and that, even if the State Court should hold that the riparian owner had a title to the submerged lands, and was entitled to be compensated for their appropriation for a public purpose connected with navigation, it would be the duty of this Court to overrule such a decision.
>
> As, for the reasons already mentioned, no such question is now before us, and, therefore, those portions of the opinion of the majority cannot justly be hereafter regarded as furnishing a rule of decision in such a case, yet I must be permitted to disavow such a proposition. *When the case does arise, I in-*

cline to think it can be shown, upon principle and authority, that private property in submerged lands cannot be taken and exclusively occupied for a public purpose without just compensation. At all events, I submit that it will be in time to decide so important a question when it necessarily arises, and when the rights of the owner of the property have been asserted and defended in argument.

The real question then in this case is whether an owner of land abutting on a public navigable river, but whose title does not extend beyond the high-water line, is entitled to compensation 'because of the permanent and total obstruction of his right of access to navigability resulting from the maintenance of a pier constructed by the United States in the river opposite such land for the purpose of improving navigation'" (italics are ours).

The learned Justice then proceeds to discuss the nature of the riparian right of access, and to express the opinion that to cut it off is to take property within the meaning of the constitutional provision. In that respect the majority opinion, of course, overruled the views expressed in the dissenting opinion. Still, however, the dissenting opinion accurately points out the fact that the Supreme Court had then before it no such question as is now presented in the case at bar ; and, as we have above suggested, the dissenting opinion expresses the individual views of three Justices of this Court in favor of our present position.

The Court of Appeals of the State of New York assumes to distinguish the present case from the *Monongahela Navigation Company* case (148 U. S.), to which we have heretofore referred. It undertakes to put the decision of this Court in that case upon the doctrine of

estoppel, and holds that without such estoppel the decision would have been to the contrary. We respectfully submit that no such limited view of the decision in the *Monongahela* case is warranted by what Justice Brewer there says. Without extended quotation, we earnestly ask the attention of this Court to the decision in that case. It was the main basis for the opinion of Attorney-General Bonaparte, and on principle seems to us decisive of the case at bar. Justice Brewer says (at pp. 335, 336, 337):

> "Upon what does the right of Congress to interfere in the matter rest? Simply upon the power to regulate commerce. This is one of the great powers of the national government, one whose existence and far-reaching extent have been affirmed again and again by this court in its leading opinions, and the power of Congress over such natural highways as navigable streams is confessedly supreme." * * *
>
> "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment, we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post-offices and post-roads; but if Congress wishes to take private property upon which to build a post-office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. And if that property be im-

> proved under authority of a charter granted by the State, with a franchise to take tolls for the use of the improvement, in order to determine the just compensation, such franchise must be taken into account. Because Congress has power to take the property, it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner must be paid to him, before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a post-office is equally true when condemnation is sought for the purpose of improving a natural highway."

The decision by the Court in that case was unanimous.

No attention, in the case at bar, seems to have been paid by the Court of Appeals of the State to the important decision of this Court in *United States* vs. *Lynah* (188 U. S., 445), which also strongly supports the present contentions of the plaintiff-in-error. This latter case emphasizes the continued division of opinion among some of the members of this Court as to what constitutes a taking of property. But upon the main question, that if the property be taken there should be compensation (although taken for purposes of improving navigation), there was no dissent whatever. We commend this case to the attention of this Court, especially from page 468 of the prevailing opinion, beginning with the question, "Was there a taking?", and including the emphatic affirmance by the Court of the decisions in the *Pumpelly* case, to be referred to *infra*, and the *Monongahela* case, and to the explanation of the Court of the decision in

the *Scranton* case. The precise decision in the *Lynah* case was that lands that had been overflowed through a public work in the improvement of the harbor of Savannah, are to be deemed "taken" by the Government, and their owners must be compensated for their loss in value.

In *Pumpelly* vs. *Green Bay Company* (13 Wallace, 166), and cited as decisive in the *Lynah* case, this Court, speaking by Justice Miller, says (p. 177):

> "The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.
>
> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always nnderstood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

Again he says (at the bottom of p. 180) :

> " We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways, for the public good, there is no redress; and we do not deny that the principle is a sound one, in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other State constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further."

Again, in *Yates* vs. *Milwaukee* (10 Wallace, 497), Justice Miller delivers the opinion of the Court. He says, in the course of his opinion (p. 507) :

> " On the whole, we are of opinion that Shepardson, as riparian owner of a lot bounded by a navigable stream, had a right to erect this wharf, and that Yates, the appellant, whether he be regarded as purchaser or as licensee, has the same right; and that if the authorities of the City of Milwaukee deem its removal

necessary in the prosecution of any general scheme of widening the channel and improving the navigation of the Milwaukee River, they must first make him compensation for his property so taken for the public use."

In the *Stimson* case (223 U. S.) to which we have heretofore referred, Justice Hughes, in speaking for this Court, calls attention to the fact that the public right of navigation follows the stream (p. 634). It may be well contended from the decision in the *Yates* case and the observations of the Court in the *Stimson* case, that the Government must take nature as it finds her; or else, if it desires to alter the course of nature, whether to make a navigable channel, or to deepen a channel, or to widen a channel, in the interests of improving navigation, it must pay the owners for the property which it takes in the furtherance of this alteration of the courses of nature.

In this connection may we be permitted to reiterate what was said by us in our first point: Why should not the Government make such compensation? Why should people engaged in the oyster industry, a worthy and legitimate industry, have their property confiscated *pro bono publico*, and lose their right to compensation, when other private citizens of this country would receive ample compensation for their property taken for the public good.

There have been two or three other recent decisions of this Court, to which its attention should be directed,

although they may not be greatly in point in the decision of this case.

Chicago, Burlington & Quincy Ry. Co. vs. *People of the State of Illinois, ex rel. Drainage Commissioners* (200 U. S., 561) is another of the numerous cases in which the question of what constitutes a taking of property, was considered. In that case it was held that a railroad company must, without compensation, rebuild a bridge which was required in its larger form by reason of a widening of a certain creek in the interest of navigation. It was held that this was not a taking of public property. The importance of this decision to the case at bar, lies in the concurrence of the present Chief Justice and Justice McKenna and Justice Holmes (see p. 595 of the Opinion). Justice Holmes, speaking for himself and the other two Justices, says:

> "I concur in the main with the judgment of the court. I agree that the public authority has a right to widen or deepen a channel if it sees fit, and that any cost that the railroad is put to in rebuilding a bridge the railroad must bear. *But the public must pay for the widening or deepening, and I think that it does not matter whether what it has to remove is the original earth or some other substance lawfully put in the place of the original earth.* Very likely in this case the distinction is of little importance, but it may be hereafter" (italics are ours).

That very distinction certainly is of importance here.

West Chicago Street Railroad Company vs. *The People of the State of Illinois, ex rel. City of Chicago.*, 201 U. S., 506, was an instance of a tunnel constructed under the Chicago River pursuant to a license so to do, where,

however, the same was granted in conformity with a statute stating that any such privilege should be availed of "*in such manner as not to* unnecessarily obstruct the public use of such street, alley, road or highway, or *interrupt the navigation of such waters.*" These italics are from the opinion of the Court, (see the bottom of page 515 of the reporter). Four members of this Court were of the opinion that under this express exception the Railroad Company could be obliged to reconstruct its tunnel when the city desired to deepen the channel of the river, without giving the corporation compensation for constructing the new tunnel. Justice Holmes concurred in the result upon the authority of the case of the *Chicago, Burlington & Quincy Railroad Company*, upon which we have just made comment. Four members of the Court dissented, including the present Chief Justice and Justice McKenna. There was no opinion in the case which represented the views of a majority of the Court.

In *Union Bridge Co.* vs. *United States*, 204 U. S., 364, this Court returns to the fundamental distinction that has run all through these recent decisions of the Supreme Court, namely, of that as to property which is taken, and property which is indirectly affected. Held, in this case that no property was being *taken* in the constitutional sense (see the opinion of Justice Harlan, pp. 388 *et seq.*). Quoting from the opinion in a prior case, this Court says, at page 390:

> "Acts done in the proper exercise of govermental powers and not directly encroaching upon private property, though their consequences may impair its

use, are universally held not to be a taking within the meaning of the constitutional provision."

An excellent summary of the questions involved in the dispute at bar, viewed from the standpoint of broad justice, and in a common sense way, will be found in the decision in *Avery* vs. *Fox*, 1 Abb. U. S., 246 (2 Fed. Cases, No. 674) decided by Judge Withey of Michigan in 1868. In that case the Court says :

"The United States have a right to make the cut between White Lake and Lake Michigan—the land, where the proposed cut is to be, having first been secured—provided thereby private interests are not seriously impaired or private rights destroyed. It is an incident to the sovereignty of the United States, and a right recognized in the Constitution, in that clause which prohibits the taking of private property without just compensation, that it may take private property for public use—of the necessity or expediency of which congress must judge, but the obligation to make compensation is concomitant with the right. (*Bonaparte* vs. *Camden & A. R. Co.* (case No. 1, 617); *Dickey* vs. *Maysville & L. Turnpike Co.*, 7 Dana, 119). In the last case the Court say, 'The national power to use the land of a citizen or state for an armory or fortification is undoubted and irresistible; the constitutional obligation to pay the owner a just equivalent, if it be demanded, is equally undoubted and irresistible.' The case involved the right to carry the United States mail over the road of a Turnpike Company without payment of toll, and at page 115 the Court say, 'The right to use private property for a mail route—as for any other national purpose, being qualified by the constitutional condition that a just compensation be made for the use, unless the owner voluntarily waive it—does not imply an authority to

take, or to use for post-office or post road purposes, the land or the house of a citizen, or the railroad or macadamized road of associated citizens, without paying to the owner or owners a just compensation.' The principle of that case is directly in point. The Legislature of the State, or the Congress of the United States, possesses whatever power exists in either government to take private property for public use and to provide compensation. If now the power to take may be exercised alone,—when we find that the lawmaking power is alone judge of the necessity or expediency of taking,—there will be found no check to its most arbitrary exercise. And as was said by Chief Justice Marshall in *Fletcher* vs. *Peck*, 6 Cranch., (10 U. S.) 135, if any limits to legislative power be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To divert a stream from its natural channel into an artificial one, for the purpose of affording improved navigation and benefiting commerce, may be a work of great public concernment and advantage, but if thereby a riparian owner is wholly or injuriously deprived of the use of its waters, which he is employing advantageously as an incident to his land, it is taking the private property of such owner in and to the use of that water for public use, and unless just compensation is made, is against both the principles of the common law and the provisions of the Constitution of the United States, and the courts have no alternative but to so administer the law as to secure and protect such rights in a proper case."

We believe that we have covered in this brief review the salient features of all of the very recent cases in this Court that might be considered as bearing at all upon this topic, and that we have also referred to most of the earlier ones.

There is one line of cases, however, to which we have not as yet made reference, and which may be appropriately grouped together without speaking of them each individually. They are typified by the case of *Stockton* vs. *Baltimore & New York Railroad Co.*, 32 Fed. Rep., 9, and the *Hawkins Point Light House* case, 39 Fed. Rep., 77. These two cases were strongly relied upon in the opinion of Justice Jaycox at Special Term, and are referred to at equal length in the opinion of the learned Attorney-General Wickersham, giving the reasons which led him to the opposite conclusion from that to which Attorney-General Bonaparte had come.

With reference to the *Stockton* case, there is a special query by Justice Bradley to which Attorney-General Bonaparte refers. Namely: Is property owned by the State of New Jersey private property within the meaning of the constitutional amendment? (See page 20 of the opinion of Justice Bradley). But the fundamental distinguishing feature between such cases as these and the one at bar, rests upon the well-known maxim *de minimis non curat lex*. In the *Light House* case the Court points out that the Government desires to put a light house in the stream to cover merely an area of twenty-seven feet square. In the *Stockton* case the Court says that the question arises " whether the appropriation of a few square feet of the river bottom to the foundation of a bridge * * * is at all a diversion of the property from its original public use " (p. 20 of the opinion). Some of the earlier cases in this Supreme Court cover like negligible appropriations of the bed of the river.

In all such cases a vastly different question was

presented from what is presented here. It may be contended that in theory the question ought to be the same, even though the Government only took twenty-seven square feet for its own uses; but practically, the way in which the Court approaches a factious objection to a great public improvement, based upon the technical position of adverse title, and the underlying motive of which is rather a desire to "hold up" the improvement than an expectancy of legitimately securing any substantial pecuniary compensation for the property, is very different from the way in which the Court would approach a consideration of the question here at bar.

We have in the Great South Bay this great and perfectly legitimate industry of the development of oysters. The Bluepoint oyster is known from one end of this country to the other, its name being of such fame that the State of New York forbids anyone to call an oyster a Bluepoint unless it comes from the Great South Bay (N. Y. Laws, 1912, Ch., 318). The Government decides that this shallow basin of water, entirely an inland lake with the exception of the small inlets that bring in the water from the sea, and which has heretofore been but technically navigable, shall be made into a place where there is really a navigable channel. The land is appropriated for digging a channel—which is in substance a canal. This channel, in running through that part of the South Bay which is covered by the leases to the plaintiff, cuts through altogether, in this particular case, two areas, one of one hundred and three and the other of forty-two acres (Findings Fifth and

Sixth), and extracts therefrom soil to a depth of ten feet below low-water mark "over a surface two hundred feet broad and about two thousand feet long" (*i. e.*, nearly half a mile) "diagonally through the above-mentioned lands" (Finding Tenth). The digging of this channel destroys "a large number of oysters on the lands aforesaid" (Finding Twelfth) and "cuts diagonally through the premises described in said leases" (Finding Sixteenth). Such a situation as that is fundamentally different from the action of the Government in erecting a lighthouse or putting down a pier into the sea or the river.

We come back to our proposition that the Government, in such an instance as this, aids navigation in the sense that it makes a water way where nature did not make a water way; it makes a place for vessels of deep draft where nature made a place for skiffs. In so doing it undertakes a public use. But in so doing, it takes private property, which is just as much private property, and just as much private property taken, as any other kind of property in this country. Again to quote Justice Hughes in the recent *Stimson* case, "the public right of navigation follows the stream" (p. 634). In this instance, the United States is artificially making the stream which the public right of navigation is to follow. Why should not the people whose property is being taken in the course of that work, be paid for it? And why should their belongings be confiscated in the manner that has been done?

III.

Some further observations regarding particular points in the opinions below.

If it may be said without irreverence, the opinion of Justice Jaycox is the only one below that does not wind up with an apology for its conclusion. Justice Gaynor in the Appellate Division says that a different question would be presented if the entry were to be made and the oysters be destroyed "without giving the plaintiff reasonable opportunity to take them up and remove them." The learned Attorney-General Wickersham adopts this view in the conclusion of his opinion, where he says:

> "That the opinion of Attorney-General Bonaparte, above referred to, must be limited in its application to operations in non-navigable waters, or the wilful and unnecessary taking, injury to or appropriation of property without reasonable opportunity being given to the owner to remove the same."

With the greatest respect, we are unable to see what legal difference such a notification would cause. The oysters may or may not, at the time of such notification, have been in a condition for removal. The Government might or might not have offered to remove them, or suggested another place where they might be put. Possibly it might be advocated that such considerations would bear upon the question of what the amount of the compensation should be in any given case. But the underlying question would always be the same as here: Has

the Government the right, or not the right, to confiscate the plaintiff's property? The conclusions of the opinions of Justice Gaynor and Mr. Wickersham are, in reality, only apologetic.

The Court of Appeals, with perhaps a more intimate knowledge of legislative action at Albany than at Washington, solaces the Oyster Company with the concluding observation that

> "Its loss may be severe, but Congress is not apt to deal ungenerously with those who have good grounds for relief."

Our Honorable State Court can hardly be aware of the length of, and pitfalls for, the crusade to which it has remitted this plaintiff-in-error, or it would not have been guilty of this satire.

Much learning has been bestowed in all of the opinions, upon the common law of England, that at once governed the right of a grantee under a Crown grant of land under water, and at the same time controlled the Government in exercising its paramount power with regard to such grants, over the waters thereon. In the instance at bar there is no doubt that the King and and Queen of England gave to their faithful subject, the Chief Justice of the Colony, Colonel William Smith, every possible thing that they had the power to give; and, as appears by the grant, that they did this for a valuable consideration. There is no doubt that these grants have been repeatedly upheld in the New York courts, and in the courts of the United States, as valid grants, conveying to the subject all of the title that the

Crown had in its so-called private capacity. See for instance, *Rogers* vs. *Jones*, 1 Wend., 237; *Trustees of Brookhaven and others* vs. *Strong*, 60 N. Y., 56; *Lowndes* vs. *Huntington*, 153 U. S., 1. As heretofore premised, the validity of this particular grant to Colonel William Smith was upheld in the *Brookhaven* case. So also we refer this Court again at this point to the language of the grant itself (as set forth in our statement), and to the language of Judge Cullen, then a Justice of the Supreme Court, and now Chief Judge of the Court of Appeals, in adjudging the title of the Smith family and the Town of Brookhaven as tenants in common (p. 51 of the Record)—where he says that they are tenants in common of

> "all that part of the Great South Bay, or lands covered with water, and the islands in said Bay * * * with all and every the beaches, bays, islands, fishing, fowling, hunting, hawking, and all the rights, members, liberties, privileges, jurisdictions, royalties, hereditaments, profits and appurtenances whatsoever thereunto belonging or in any way appertaining; that they are seized and possessed of the bed of the bay, the water and islands therein, and that they are the exclusive owners of the fishery therein, embracing shell fish, crabs, mussels and floating fish and of all wild fowl, birds and game within the premises aforesaid, the said Smiths and the said corporation owning each an undivided equal half part thereof" (pp. 51 and 52).

There is now suggested the theory that there was a governmental *title* reserved by the Crown (as distinct from a govermental *power*) to which title the Government of the United States has succeeded,—a sort of title

to a certain springing use, as it were, by which the Government at any time could work a practical revocation of this grant whenever it desired so to do in furtherance of an improvement to navigation.

In reference to such a claim we assert, in the first place, that there is nothing in the decisions of the American courts that warrants any such contention. The two most interesting decisions on the so-called *jus privatum* and *jus publicum* of the Crown, are the early decision of *Rogers* vs. *Jones*, cited *supra*, and the decision in this Court of *Shively* vs. *Bowlby*, 152 U. S., 1. The latter is an enormous compendium of authority, but the former, perhaps, represents better the spirit of the common law, being written at an earlier date when the old books were more in usage than they have since come to be. In neither of these cases will there be found sanction for any such claim as that for which the Government now contends.

In the second place, this particular Crown grant covers, not by implication but in express language, every possible title and right for which the plaintiff-in-error now contends. It cannot be successfully argued that the Crown reserved something by implication that it had the power to give, when everything that it had the power to give was given *expressly*. The question must come down to an implied reservation of this sort of title, for lack of power to grant the same ; and so Judge Vann seems forced to admit. But when we come to such questions as to what the power of the Crown was or was not, we are relegated to the situation at the time of these grants (in the latter part of the seventeenth

century) ; and there comes necessarily to mind the thought that the Crown in those days did not make channels where there were no channels, or otherwise undertake the great enterprises made possible by the use of steam and modern machinery that are now undertaken, by which the hand of man is as much responsible for our inland navigation as is the hand of nature. Of course there is no case or text book in the common law of the seventeenth century or earlier, which is decisive of the present question, because no such problems were then before the People of England or their Parliament or their Courts.

It was undoubtedly the law that neither the King nor the holders of grants from the King, could fence in, interpose any structures upon, or otherwise deal with, the navigable waters or the lands thereunder in such a way as to *impede* navigation. This development of the law may have arisen somewhat from the nature of the waters as distinct from land ; somewhat from the restrictions of the Magna Charta ; and somewhat from the customs of the Anglo-Saxons from the earliest times in asserting and practicing the right of navigation in every navigable water about England. But nothing in any of these early text-books or authorities will be found to suggest that the public free right of navigation included a right of the Crown to retake a grant made to a subject, by entering upon the lands under the water and working therein, or changing their nature, for the purpose of improving navigation.

The undersigned counsel has examined Hale's celebrated Treatises in Volume 1 of Hargrave's Law Tracts.

Our citations of pages are from that reprint of the works of the great Chief Justice. At page 10 it is said under the heading in *De Jure Maris*, "Concerning the King's interest in salt waters, the sea and its arms, and the soil thereof":

> "The narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions of the King of England, whether it lie within the body of any county or not.
>
> This is abundantly proved by that learned treatise of Master Selden called *Mare Clausum;* and therefore I shall say nothing therein, but refer the reader thither.
>
> In this sea the King of England hath a double right, viz.: a right of jurisdiction, *which he ordinarily exerciseth by his admiral,* and *a right of propriety or ownership*" (italics are ours).

It looks from this as if the *jus publicum* was originally merely in aid of public order.

In *de Portibus Maris* (p. 72 of the Law Tracts), it is said:

> "And first of the *jus privatum.*
>
> Having now considered the originall of sea ports, I come to the several rights that are to be found, & observed & carefully distinguished in the consideration of public sea ports.
>
> In all publick seaports in England, there are three kinds of rights that meet; and though they are distinct from one another, yet they consist one with another, whether the ports belong in point of franchise or propriety to the King or to a subject.
>
> I.—*Jus privatum*, interest of propriety or franchise.
>
> II.—*Jus publicum*, the common interest that all persons have to resort to or from publick ports, as publick sea marts or markets, with their goods, and wares and merchandizes.

III.—*Jus regium*, or the right of superintendency and perogative, that the King hath for the safety of the realm or benefit of commerce or security of his customs." * * *

(p. 73) " Before any port is legally settled, although the propriety of the soil of a creek or harbour may belong to a subject or private person, yet the King hath his *jus regium* in that creek or harbour; and there is also a common liberty for any to come thither with 72, 73 boats & vessells as against all but the King."

Here again the point of the public and royal right lies in connection with the waters rather than in the lands under water.

If Selden's *Mare Clausum*, be examined, thus given the stamp of approval by Lord Hale, it would appear that the king's dominion over the seas was absolute and unqualified, and his grants thereof to subjects, of the like force, (see, for instance, p. 391 in the English Translation of 1663).

It is, as we have observed, to be remembered that inquiries into the common law as it stood centuries ago, are always attended with the uncertainty of misunderstanding the author or of failing to be in the atmosphere precisely of the times. The fact that Lord Hale said one thing or another as to the private and public rights of the Crown, can scarcely be a determining feature in this case. The determining factors, as they seem to us, and as we respectfully submit, are these: The United States has taken these lands for a public use; it has taken the oysters that were on these lands. The United States does not claim to have had the title to those lands. The

title was in some one, whether in the State of New York or in a private citizen. The State of New York has held that the title lay in this particular plaintiff-in-error, as successor to the Smith family. Therefore, under the provisions of the United States Constitution, it was just and equitable that fair compensation should be made to the plaintiff-in-error and that its property should not have been thus confiscated—as was permited by the judgments below.

IV.

The judgments below should be reversed and the case remitted to the Supreme Court of the State of New York, with directions to take further proceedings and inquire into the present situation regarding these lands and the oysters thereon, and either to enjoin the defendant from entering upon the lands, if entry has not been made, or, if entry has been made, then to award plaintiff just compensation from the defendant for the property taken.

Respectfully submitted,

WING & RUSSELL,
Attorneys for Plaintiff-in-Error.

HOWARD TAYLOR,
Of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, plaintiff in error,
v.
J. MARVIN BRIGGS.

No. 272.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR THE UNITED STATES.

The facts are clearly and sufficiently stated in the brief of plaintiff in error.

The suit was brought to restrain a Government contractor from dredging a channel through submerged lands underlying the navigable waters of the Great South Bay on Long Island, New York. The claim was that the work could not lawfully be done without compensating the plaintiff for the loss and injury of his oyster beds.

All the New York courts found in favor of the Government.

Supreme Court, Suffolk County, Jaycox, J., Rec. p. 67; reported, 58 Misc. 55.

Appellate Division, Second Department, per Gaynor, J., Rec. p. 72, reported, 129 App. Div. 574.

Court of Appeals, per Vanne, J., Rec. p. 77, reported, 198 N. Y., 287.

ARGUMENT.

The conflict, in our view of the case, is between *public* property rights in the submerged lands and *private* property rights therein, and our position is that the uses which the Government proposes here to exercise are mere public uses inherent in the paramount public property rights in navigable waters, and that, conversely, the private property rights are subject to such uses, and that, therefore, *no property of the plaintiff in error* is being taken at all.

This was the position of the courts below.

The point that it is a question of the extent of the plaintiff's *title* was the basis of the decision in *Hill* v. *U. S.*, 149 U. S., 593, fully stated under Point III, *infra;* and see the distinction drawn by this court in *Chappell* v. *U. S.*, 160 U. S., 499, between property rights in "fast" land and those in submerged lands.

I.

THE NEW YORK LAW LIMITS THE PLAINTIFF'S TITLE BY THE SERVITUDE IN FAVOR OF NAVIGATION.

Conceding, for the purpose of the argument, that the New York property rights of the plaintiff in error are the utmost which a private person can possibly hold in the bed of a navigable stream within that State, it is thoroughly settled, even under the local law, that they are subject, *as a matter of property title,* to a limitation, in the nature of an easement, servitude, or trust, in favor of the necessities of navigation (the "*jus publicum*").

The opinions below collect the New York authorities to this proposition, including especially the leading and decisive cases of *Sage* v. *Mayor*, 154 N. Y., 61, 79, and *Trustees of Brookhaven* v. *Smith*, 188 N. Y., 74, the latter of which included the very submerged lands here in question.

In *Scranton* v. *Wheeler*, 179 U. S., 141, 161, and *Shively* v. *Bowlby*, 152 U. S., 1, 20–21, this court reviewed the New York law and found it to be as we have stated.

The same rule existed in England at the time of the grant to the plaintiff's predecessors in title.

> *Shively* v. *Bowlby*, 152 N. S., 1, 11–14.
>
> *Attorney General* v. *Parmenter*, 10 Price, 378 and 412.
>
> *Mayor & Burgesses of Nottingham* v. *Lambert*, Willes, 111.
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>
> *Hargrave Law Tracts*, pp. 11, 12, 25, 36, 84, 89.

And it was continued in England as in New York until a change was effected by statute.

> *Attorney General* v. *Lonsdale*, L. R. 7, Eq. Cas., 377.
>
> *Attorney General* v. *Terry*, L. R. 9 Ch. App., 423, 430. (Opinion of Jessel, M. R., in lower court.)

The similar rule for Illinois land titles was stated and recognized in *West Chicago St. R. R. Co.*, v. *Chicago*,

201 U. S., 506, *infra*, and the rules of other States were collected and discussed in *Scranton* v. *Wheeler, supra.*

In Louisiana the *jus publicum* extends even to the fast land, to erect levees thereon, without compensation. (*Eldridge* v. *Trezevant*, 160 U. S., 452.)

Necessarily the plaintiff stands upon an assertion of property rights, and necessarily his property rights are concluded, as between him and his State, by the New York law defining his title (*Lowndes* v. *Huntington*, 153 U. S., 1), and so he is foreclosed by the above authorities.

II.

BUT ANYWAY THE UNITED STATES SUCCEEDED TO THIS PART OF THE JUS PUBLICUM AND ITS RIGHTS ARE PARAMOUNT.

But were the law of New York otherwise as to the nature of these property rights, the plaintiff in error still cannot succeed because a portion of the *jus publicum* over the soil under navigable streams went under the Constitution to the United States and that restriction upon the title is paramount.

Barnes v. *Midland Terminal R. R. Co.*, 193 N. Y., 378;

Webber v. *Harbor Comm'rs*, 18 Wall. 57, 65;

Illinois Central R. R. Co. v. *Illinois*, 146 U. S., 387, 435;

Shively v. *Bowlby, supra*, 152 U. S., 1, at pp. 40 and 47;

Phila. Co. v. *Stimson, infra*, 223 U. S., 605;

Scranton v. *Wheeler*, 179 U. S., at pp. 156, 157, 159, 160–1, 165, *supra*.

This proposition was the foundation of the opinion in *Philadelphia Co.* v. *Stimson*, 223 U. S., 605, where the State had fixed harbor lines defining the private property rights, but they were held of no effect against subsequent lines fixed by the United States, and therefore the complainant was held not entitled to build upon his submerged lands, though so far as his State was concerned he had been given the right. The discussion is at pages 632 to 638 of the opinion, and seems to us pat to our point.

Mr. Justice Lurton, when circuit judge, writing the opinion of the Court of Appeals in *Scranton* v. *Wheeler*, stated the rule exactly (57 Fed., 803, 813) in a passage quoted by this court in its statement of *Scranton* v. *Wheeler* (179 U. S., at pp. 144–145, and cited again at p. 149 in quoting the Supreme Court of Michigan).

> The State of Michigan held the soil beneath her navigable rivers under a high public trust, to forever preserve them free as public highways, subject only to the power of Congress to regulate commerce among the States. The legal title which, under the law, becomes vested in such proprietors, must be subject to the same public trusts, and therefore subordinate to the power of Congress to control and use the soil under such streams whenever the necessities of navigation and commerce should demand it. The right of Congress to regulate commerce and, as an incident, navigation remains unaffected by the question as to whether the title to the soil submerged is in the State or is in the

> owner of the shores. A distinction must be recognized between that which is *jus privatum* and that which is *jus publicum*. This private right is subordinate to the public right. The plaintiff holds the naked legal title, and with it takes such proprietary rights as are consistent with the public right of navigation and the control of Congress over that right.

This language this court substantially repeated in its own opinion, as follows:

> Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as in his upland, but to be held at all times subordinate to such use as may be consistent with or demanded by the public right of navigation (p. 163).

We think it unnecessary to review here the other cases supporting this proposition, because they are all either reviewed in the above cases or cited in the next point, but in passing we may observe that in *Gilman* v. *Philadelphia*, 3 Wall., 713, 724, the court (in this connection) said that "the navigable waters of the United States for this purpose [navigation] are *the public property of the Nation*, and subject to all the requisite legislation by Congress"—a phrase which has been quoted with approval by substantially all subsequent cases, including the last one. (*Phila. Co.* v. *Stimson, supra.*)

III.

THE JUS PUBLICUM EXTENDS TO THE IMPROVEMENT OF A CHANNEL BY DREDGES.

Counsel for plaintiff in error, if we understand them aright, do not controvert these general propositions. Their point is that the public property right in respect of navigation is limited to the use of the waters in their natural state, and does not extend to their improvement by artificial means. Of course we do not mean to say that they contest the right of the Government to exercise eminent domain for this purpose. Their contention, if we understand it, is merely that the public property easement is not broad enough to carry a right to change the natural state of the river and its bed.

Whether they will go to the extent of contending that the public right does not permit the Government by artificial means, to keep a natural channel ("natural" as of what date?) clear from *natural* encroachments, they say not, though their proposition would seem to force them to that point.

But, taking the very proposition that they make, it seems to us settled by at least the following cases:

(1) *West Chicago Railroad* v. *Chicago*, 201 U. S., 506.

Congress proposed to deepen a channel by dredging, and required the city of Chicago to remove all obstructions to this improvement, without expense to the United States. Pursuant to this requirement the city ordered the railroad to make way for the dredging by lowering a tunnel which lay in

the subsoil, and to do so at its own expense. The railroad claimed, as owner of the lands under water, that, so far from being required itself to bear this expense, it was even entitled to compensation for the injury.

The court overruled the contention, and the case meets this one on all fours and, in so far as it puts affirmative expense on the railroad, goes much beyond it.

(2) *Chicago, Burlington & Quincy Railway* v. *Drainage Commrs.*, 200 U. S., 561.

In the course of enlarging a stream to carry drainage, the local drainage commissioners ordered the railroad to remove at its own expense the abutments of its bridge, which, though not an obstruction to the stream as it was when the bridge was built (under due authority), did stand in the way of the projected artificial improvements. The railroad contested, but the public right was sustained. Counsel in this case find comfort (brief, p. 28) in the separate opinion, concurring in part and dissenting in part, filed by Mr. Justice Holmes on behalf of himself and the present Chief Justice and Mr. Justice McKenna. It seems to us clear that the point of *dissent* was whether the railroad could be put to any affirmative expense in the widening and deepening, and that the *concurrence* covers this case, which deals merely with the right of the Government itself to clear this way. But if the dissent was intended to mean what counsel claims it meant, it has not survived the controlling

opinion of the majority of the court, as is shown by the acquiescence of the dissenting justices in the subsequent cases which we cite.

(3) *Hill* v. *U. S.*, 149 U. S., 593.

This was an action for damages for alleged taking of the property of the plaintiff—i. e., as claimed, the submerged soil—for a Government lighthouse. The Government denied the plaintiff *title* (as it does here) on the ground that any private property right is subordinate to the paramount public right to improve navigation. The court dismissed the case on the ground that as the Government did not concede the plaintiff's *title* there was no "taking," but at most a tort.

(4) *Scranton* v. *Wheeler, supra.*

The Government erected a pier as an improvement to navigation, but in such a way that it cut off the plaintiff's access to his submerged lands. It was held that the plaintiff was not entitled to compensation.

If the Government right does not include the right to make artificial improvements to navigation, the case was wrongly decided.

(5) *Gibson* v. *U. S.*, 166 U. S., 269, 271, 275, 276.

The Government cut off plaintiff's access to her submerged lands by building a dike as an improvement to navigation. It was held that no compensation was required. The court said:

> Moreover, riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of

> the dominant right of the Government in that regard (p. 276).
>
> * * * * * * * * * The damage * * * was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject (p. 276).

(6) *South Carolina* v. *Georgia*, 93 U. S., 4.

The power to improve upon nature without compensation was held to include the power to build a dam for the purpose of closing one channel entirely in order to improve the other.

(7) *Union Bridge Co.* v. *U. S.*, 204 U. S., 364, and *Hannibal Bridge Co.* v. *U. S.*, 221 U. S., 194, and cases cited.

Of course these do not involve affirmative changes by the Government in the natural state of the stream, but fundamentally they go on the same principle. They hold that bridges, even though they were in conformity with the requirements of commerce at the time they were built, must yield to the growing necessities. The extension of the public use as compared with the "natural" use is upward rather than downward as in the present case and the *West Chicago Railroad* case, *supra*, but otherwise there is no ground of distinction. Certainly nothing in the opinions indicates any such conception, but on the contrary the theory was that Congress could "improve" navigation without compensation.

(8) *Chappell* v. *Waterworth* (Hawkins Point Lighthouse case), 39 Fed., 77, contains a most valuable analysis of the authorities, and has become a leading case. (See statement of it in *Scranton* v. *Wheeler, supra*, 179 U. S., at p. 150.) It held that the "bed of the river" is not "private property" in the sense of the fifth amendment, to preclude the Government from taking it for the foundations of a lighthouse, as against an unexercised right to wharf out. (See the case dismissed on a jurisdictional ground in 155 U. S., 102.)

(9) *Lane* v. *Harbor Commissioners*, 70 Conn., 685, and *Same* v. *Smith*, 71 Conn., 65, are also exactly in point even to the circumstance that the things injured by the dredging were oysters. The court relied particularly on the *Gibson* case, *supra*.

(10) *Stockton* v. *Baltimore & New York R. R.*, 32 Fed., 9, 20 (Mr. Justice Bradley), approved in *Scranton* v. *Wheeler, supra*, at p. 159.

The attorney general of New Jersey was held to have no right to enjoin the taking of submerged soil owned by the State in its private capacity, for piers, to be erected in aid of, and as an improvement to, navigation. The court held that the proposed use was not an extension into any private property right.

(11) See also *Transportation Co* v. *Parkersburg* 107 U. S., 691, page 700, *County of Mobile* v. *Kimball*, 102 U. S., 691, page 697, containing *dicta* describing the power of the United States to regulate commerce (which represents the federal *jus publicum* in these

cases, *Barnes* v. *Midland Terminal R. R. Co.*, *supra*, 193 N. Y., 378, and other cases cited, Part II, *supra*) as including improvement of channels by dredging. The cases themselves uphold the State power (in the absence of Congressional legislation) over wharfage, pilotage, etc.

(12) *Wabash Railroad Company* v. *Defiance*, 167, U. S., 88, and *New Orleans Gas Co.* v. *Drainage Commission*, 197 U. S., 453, establish the same principle in reference to the changing of street grades. The private right was held subject to the public power to make such changes.

Contrary to these authorities, we know of none excepting Judge Simonton's decision in *Brown* v. *U. S.*, 81 Fed., 55 (Circuit Court). That decision, however, seems hardly to have satisfied Judge Simonton himself, for he subsequently held in *Richardson* v. *U. S.*, 100 Fed., 535, that an owner of oyster beds on submerged lands was not entitled to compensation for damage done by physical invasion through mud thrown out in the course of dredging. If the oyster beds had been fast land, such an invasion would seem necessarily to have carried a right to compensation under *Pumpelly* v. *Green Bay Co.*, 13 Wall., 166, 181 (see passage quoted in *Scranton* v. *Wheeler*, *supra*, 179 U. S., at p. 154), and *U. S.* v. *Lynah*, 188 U. S., 445.

The opinion of Attorney General Bonaparte, in 26 Ops., 441, was distinguished by Attorney General

Wickersham, in 27 Ops., 311, as applying only to nonnavigable waters.

Monongahela Navigation Co. v. *U. S.*, 148 U. S., 312, is distinguishable in two respects: (1) The Government there undertook, not to remove an obstruction, but to seize and convert to public use a lock and dam built by and belonging to a private company. It was as if the United States or the State of New York had taken this oyster bed and operated it as a public fishery—a very different matter from cutting through it as an incident to improving navigation. The line of distinction coincides with the line which divides the public property right from the private property right[1]; and the case is further distinguished in that (2) the lock and dam were erected at the affirmative and direct request of Congress.

Pumpelly v. *Green Bay Co.*, 13 Wall., 166, 181, *supra*, and *U. S.* v. *Lynah*, 188 U. S., 445, were cases of fast land, as to which the private title was not limited by the servitude in favor of navigation.

Yates v. *Milwaukee*, 10 Wall., 497, 504–5, was distinguished in *Scranton* v. *Wheeler*, *supra*, 179 U. S., at p. 157, as being a case of arbitrary interference, not shown to be justified by any needs of navigation. It also involved interference by a *State* with what the State itself recognized as a *property* right. The case has been held inapplicable to New York lands. *Sage* v. *Mayor*, 154 N. Y., 61, at p. 78.

[1] Cf. *Huffmire* v. *Brooklyn*, 162 N. Y., 584, where dumping sewage in plaintiff's oyster beds, held under State permit, was ruled to be a violation of his property rights and to require compensation.

The decision of Mr. Justice Holmes, when on the Supreme Court of Massachusetts, in *Bent* v. *Emery*, 173 Mass., 495, dealt with flats and involved also a taking of soil. (See *Crocker* v. *Champlin*, 202 Mass. 437; 89 N. E., 129.)

CONCLUSION.

The judgment should be affirmed.

April 23, 1913.

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